CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1933

A. E. LITTLE, MRS. OSCAR HARTSELL AND HUSBAND, OSCAR HARTSELL, MRS. ALICE HOWARD AND HUSBAND, GEORGE HOWARD, MRS. FRONIE HOWARD AND HUSBAND, R. F. HOWARD, LETHIA BURRIS, CROWELL BURRIS, LILLIAN BURRIS, HOYLE BURRIS, ESTELL BURRIS, CHRISTOPHER BURRIS AND CLINTON BURRIS, MINORS, BY THEIR NEXT FRIEND, R. T. BURRIS, v. J. LUTHER LITTLE, MINNIE LITTLE, MRS. ROXIE LITTLE LEE AND HUSBAND, D. B. LEE.

(Filed 28 June, 1933.)

1. Pleadings D d—

The filing of an answer waives the right to demur *ore tenus* on the ground that a good cause of action is insufficiently stated.

2. Deeds and Conveyances A a—Close blood relationship constitutes good consideration for deed.

The relationship between the parties is a good consideration for a deed executed by a father to his children, and his deed is valid where the rights of creditors or subsequent purchasers for value without notice are not involved.

3. Deeds and Conveyances C f—Plaintiffs held not entitled to attack deed for breach of covenant to support grantor.

A father executed to certain of his children a deed containing a covenant that the grantees should support the grantor for the remainder of his life. After the grantor's death, plaintiffs, other children and grandchildren of the grantor, sought to set aside the deed for breach of the covenant. The grantor did not retain the right of reëntry and did not seek to rescind or cancel the deed during his lifetime. Plaintiffs did not allege that they had contributed anything to the support of the grantor. *Held*, plaintiffs could not complain of the breach of the covenant.

4. Appeal and Error J e—Held: verdict determined merits of action and the sustaining of demurrer to one cause alleged was not prejudicial.

Plaintiffs sought to set aside a deed on the grounds of fraud and undue influence and mental incapacity of the grantor. The allegations of fraud and undue influence, construing the complaint liberally as a whole, were based upon the age and alleged mental incapacity of the grantor. The trial court sustained a demurrer as to fraud and undue influence and submitted an issue as to mental capacity to the jury, which was answered in favor of defendants. *Held*, the verdict determined the issue of fraud and undue influence as set up in the pleading, and sustaining of the demurrer will not be held for error.

CIVIL ACTION, before *Hill, Special Judge,* at September Special Term, 1932, of STANLY.

The plaintiffs and the defendants are the children and grandchildren of John A. Little, deceased, who died intestate in April, 1930, owning certain tracts of land in Stanly County. The complaint alleged that on 3 February, 1915, John A. Little executed a deed to the defendants for said land, which deed was duly recorded, and that thereafter on 30 December, 1919, the said deceased J. A. Little executed three other deeds for the same property; one to Luther Little, purporting to convey all of said land except two ten-acre tracts therein referred to, and to these ten-acre tracts he executed deeds to Roxie Little Lee and Minnie Little respectively. All of said deeds were duly recorded. The plaintiffs further allege that said deeds were void for that: (1) while the deed of 3 February, 1915, recites a consideration of $25.00 "that even this small amount was not paid, and that while said deed purports to be based upon consideration, there was no consideration whatsoever for said deed," and that the land was reasonably worth $10,000 at the time of execution of the deeds. (2) That the last three deeds are void for the further reason that it was provided therein that the defendants, and especially J. L. Little "was to furnish at his own proper cost and expense a comfortable home, board and clothing for the said J. A. Little and his wife, Margaret Little, during the remainder of their natural lifetime, . . . and that the said Luther Little nor the other defendants at any time furnished a comfortable home for the said J. A. Little and Margaret Little; that instead of the said J. Luther Little furnishing a home for J. A. and Margaret Little the said J. A. Little furnished him a home, and practically all of his life and up until the death of said J. A. Little that the said Luther Little lived with the said J. A. Little on the lands of said J. A. Little, which are the lands above described, and paid no rents for the same, and worked and cultivated the same without paying anything therefor, and that the said J. A. Little continued to live in his, the said J. A. Little's home, after the making of said deed, and lived in his own home until the time of his

death." (3) That the deeds were procured by fraud and undue influence perpetrated by the defendants upon their father, J. A. Little, for "that at the time of the execution of said deed, and for many years prior thereto, and since, up until the death of said J. A. Little the said J. A. Little was feeble in mind and not capable of knowing the consequences of any business transaction and mentally incapable of making a valid deed at the time of the execution of the purported deed of 3 February, 1915." It was further alleged that the deeds made on 30 December, 1919, were void for that the grantor, J. A. Little, did not have mental capacity to execute a deed and was a man of feeble mind for a number of years prior to the execution of the deed and continuously until his death.

The defendants filed an answer denying all allegations of fraud or mental incapacity or undue influence.

After the pleadings had been read the defendants interposed a demurrer *ore tenus* as follows: (1) For that said complaint failed to state a cause of action to have the deed declared void and canceled of record for want of or inadequacy of consideration. (2) For that said complaint failed to state a cause of action to have the deeds declared void and canceled of record based upon plaintiffs' allegation of fraud and undue influence or either of them. (3) For that said complaint failed to state a cause of action to have the deeds declared void and canceled of record based upon the plaintiffs' allegation that the deeds did not designate the respective interests of the grantees named therein. (4) For that said complaint failed to state a cause of action to have the deeds declared void and canceled of record based upon the plaintiffs' allegation of lack of mental capacity on the part of the grantor to execute the same.

The court sustained the demurrer as to all the causes of action alleged in the complaint except the one with reference to the mental capacity of J. A. Little at the time of the execution of the deeds. Five issues were submitted, but only one was answered by the jury, as follows: "Did John A. Little, at the time of the execution of the deed of 3 February, 1915, have sufficient mental capacity to make the same?" The jury answered the issue "Yes."

From judgment upon the verdict that the defendants, "their heirs and assigns are the owners in fee simple of the lands described in said deed" plaintiffs appealed.

Sikes & Reap, D. E. Henderson and A. C. Honeycutt for plaintiffs.
Brown & Brown and Morton & Smith for defendants.

BROGDEN, J. The defendants, having filed an answer to the merits, waived a defective statement of a good cause of action; that is to

say, a demurrer *ore tenus* is not available after answer to the merits, merely for the reason that a good cause of action has been defectively stated. *Mizzell v. Ruffin,* 118 N. C., 69, 23 S. E., 927; North Carolina Practice & Procedure by McIntosh, p. 454. Consequently, it becomes necessary to interpret the complaint. The deeds are not contained in the record, and there is no evidence of consideration except the allegation in the complaint that they recited a consideration of $25.00. The deed was made by a father to three of his children. This Court has held that close blood relationship constitutes a good consideration for a conveyance of land. *Exum v. Lynch,* 188 N. C., 392, 125 S. E., 15. Moreover, it was held in *Howard v. Turner,* 125 N. C., 107, 34 S. E., 229, that "a deed in proper form is good and will convey the land described therein without any consideration." Of course a court of equity will set aside a deed for lack of consideration when the interest of creditors or subsequent purchasers for value without notice are concerned. Therefore no cause of action was alleged in the complaint upon the aspect of consideration. Nor can the plaintiffs succeed by virtue of allegations with respect to the breach of the covenant for support. The grantor in his lifetime did not claim a breach of such covenant or attempt to assert the same. He retained no right of reëntry and did not seek to rescind or cancel the deed. There is no allegation that any of plaintiffs contributed anything to the support of their father or mother, and hence they are not entitled to complain of the breach of the covenant, if such were established. *Helms v. Helms,* 135 N. C., 164, 47 S. E., 415.

The second ground for the demurrer *ore tenus* was that the complaint failed to state a cause of action for fraud and undue influence or either of them. The defendant answered to the merits before the demurrer was made and did not at any time request that the allegations of the complaint in this respect be made more specific, and, nothing else appearing, the plaintiffs' contention that it was error to sustain the demurrer upon the ground that fraud and undue influence were not properly alleged, would be well founded. *Riley v. Hall,* 119 N. C., 406, 26 S. E., 47. Notwithstanding, the complaint must be construed as a whole, and the pleading in this action, when liberally interpreted, discloses that the allegations of fraud and undue influence were based upon the theory that the grantor was old and feeble minded and did not have sufficient mental capacity to make a deed. Consequently, a determination of the mental capacity of the grantor involved and included the issues of fraud and undue influence as set up in the pleading.

The trial judge submitted the issue of mental capacity to the jury and the verdict sustained the deeds. The Court is of the opinion that the substantial merit of the controversy, as laid in the pleading, has been established by the verdict, and the judgment is approved.

No error.

MICHIE BRADY v. FUNERAL BENEFIT ASSOCIATION OF THE STATE CAMP PATRIOTIC ORDER SONS OF AMERICA OF NORTH CAROLINA, INCORPORATED, AND WASHINGTON CAMP NO. 58, PATRIOTIC ORDER SONS OF AMERICA.

(Filed 28 June, 1933.)

1. Insurance T c—Rights under policy in mutual benefit association held forfeited by insured's failure to pay dues.

The members of a local camp of an order were insured by its affiliated mutual benefit association, the members of the camp paying dues to the camp and the camp paying assessments to the association. The by-laws of the association provided that no benefits should be paid for the death of a member who was more than thirteen weeks in arrears in his dues. Insured was thirty-five weeks in arrears in his dues to the camp at the date of his death, but the camp had paid to the association all premiums for all its members, including the insured: *Held*, under the association's by-laws the beneficiary named in the policy was not entitled to recover on the policy, other by-laws of the association relating to the payment of benefits by the local camps not being repugnant to the by-laws providing for forfeiture of benefits for nonpayment of dues.

2. Estoppel C a—

Waiver is an intentional relinquishment of a known right, and knowledge of the right and intent to waive must be made plainly to appear.

3. Insurance T c—Association's retention of premiums from local order held not to constitute waiver of insured's failure to pay dues.

The members of a local camp of an order were insured by its affiliated mutual benefit association, the members of the camp paying dues to the camp and the camp paying assessments to the association. The local camp paid assessments to the association on all its members and the association accepted payment without knowledge that insured, one of the members of the local camp, was grossly in arrears in his dues. *Held*, the assessment of insured as a member was paid by the local camp and not by insured, and the association's acceptance of payment without knowledge of insured's bad standing did not constitute a waiver, nor does its retention of the assessment after knowledge constitute a waiver, the question of refunding being a matter of adjustment between the camp and the association, and the camp not being an agent for insured in paying the assessment, the camp being forbidden to do so by the by-laws of the association.

CLARKSON, J., dissenting

APPEAL by defendants from *Cowper, Special Judge,* at March Term, 1933, of CABARRUS. Reversed.

Hugh G. Mitchell and Hartsell & Hartsell for appellants.
Armfield, Sherrin & Barnhardt for appellee.

ADAMS, J. Washington Camp No. 58 is a fraternal organization located at Kannapolis and the Funeral Benefit Association is licensed by the State of North Carolina to insure the members of Washington Camp. The association insured the life of C. R. Brady, a member of the camp, in the sum of five hundred dollars. The insured died on 5 September, 1931, and the plaintiff was named as the beneficiary of the insurance. She furnished proof of loss and upon their refusal to make payment brought suit against the defendants.

At the time of his death the insured was in arrears for more than thirty-five weeks in the payment of his dues to the local camp. According to the "laws, rules, and by-laws" the camp agreed to make no claim on the association for funeral benefits upon the death of any of its members (b) when the deceased member was not in good standing in the camp at the time of his death and entitled to benefits from the camp according to the laws of the National and State Camps and the constitution and by-laws of the Washington Camp, or (g) if the deceased member was in arrears for dues to his camp for more than thirteen weeks at the time of his death. Article 3, sec. 3.

It was likewise provided that no camp should receive funeral benefits from the association in the following cases: . . . (c) If the member by reason of whose death the claim is made was not in good standing in his camp and in the order as provided by the laws of his camp and the laws of the State and National Camp, or (f) for the death of a member in arrears for dues to his camp for over thirteen weeks at the time of his death. Article 12, secs. 1, 2.

While the foregoing articles embody the pertinent agreement between the camp and the association with respect to the exclusion of funeral benefits, the plaintiff relies upon Article 3, sec. 2, which provides in substance that every camp must have a local law requiring payment to the beneficiary of the deceased member of the full amount *received* from the association, irrespective of the time of his membership or financial standing, less the cost of probate and charges due the camp; but this provision was obviously intended to prevent the diversion or dissipation of the funeral benefit and to assure its payment to the beneficiary.

The financial secretary of the camp testified as follows: "I didn't do anything with reference to paying his dues to the Funeral Benefit Association up to the time he died. We get a card from the State secretary, every member that is on the roll at the first of each month, and we are supposed to pay that on the 20th of each month. I never dropped him from the roll until after he was dead. I never notified the State secretary that he had been dropped until after he died. I paid the Funeral Benefit Assessments against our camp of all members that were on the roll each month, including Mr. Brady, up to his death. I dropped him as soon as I found out he was dead."

From this testimony the plaintiff draws the conclusion that the association received the funeral assessments and is consequently liable for payment of the insurance. This is a misconception. The assessments were not paid by the deceased whose dues were grossly in arrears; the association did not know the deceased was in "bad standing" with the camp; and if, after receiving this information it had paid the insurance it would have violated the express terms of its agreement with the camp.

The trial court submitted two issues: the first, whether the association had waived the provisions contained in its laws and introduced in evidence; the second, the amount alleged to be due the plaintiff.

The court instructed the jury to answer the first issue in the affirmative if they found the facts to be as testified and as the evidence tended to show, being of opinion that the defendant, having received the $3.00 from the local order, having learned that it was paid for the benefit of the deceased, having held it from that time, and not having returned it, had waived the provisions offered in evidence. The trial resulted in a verdict and judgment for the plaintiff, from which the defendants appealed.

The defendants did not except to the instruction on the ground that a directed verdict is never permissible, for if all the evidence is practically one way in regard to the essential facts it is not error to instruct the jury, if the facts are found to be as stated in the testimony, to answer the issue as indicated in the charge. *Gaither v. Ferebee,* 60 N. C., 303; *Wetherington v. Williams,* 134 N. C., 276; *Grain Co. v. Feed Co.,* 179 N. C., 654; *Trust Co. v. Ins. Co.,* 201 N. C., 552. The question is whether the evidence establishes a waiver as a matter of law.

Waiver is the intentional relinquishment of a known right. It is usually a question of intent; hence knowledge of the right and an intent to waive it must be made plainly to appear. *Mfg. Co. v. Building Co.,* 177 N. C., 103. "There can be no waiver unless so intended by one party and so understood by the other, or unless one party has so acted as to mislead the other." 2 Herman on Estoppel, sec. 825.

When the financial secretary of the camp paid the funeral benefit assessment the association did not know that the deceased had forfeited his right to the insurance. The court, therefore, applied the doctrine of waiver only to the retention of the assessment by the association with knowledge of the "bad standing" of the insured.

In our opinion there is error in the instruction. The insured paid no assessment after 1 January, 1931. The amount subsequently paid was advanced by the camp. The camp cannot be deemed to have been the agent of the insured for this purpose, because it had no legal right to act as such agent in direct violation of its contract with the association. Indeed, the association received no money from the insured after

the first day of January and was therefore under no obligation to make any remittance to the beneficiary after acquiring knowledge of all the facts. The question of refunding is a matter to be adjusted between the defendants.

Furthermore, there is no evidence of an intention on the part of the association to appropriate to its own use the amount advanced by the camp. *Matthews v. Ins. Co.,* 147 N. C., 339. It has indicated its readiness to return the money, although it may have no right prematurely to demand a receipt.

This is a case to which the language of the Court in *Hay v. Association,* 143 N. C., 256, may appropriately be applied: "It is always sad when one who has made payments on his policy deprives his family of expected protection by failure to pay at a critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. It is a warning of which the company also has a right to take notice when asked to waive a forfeiture. It is the insured's own fault when he does not make a payment as contracted."

As to the plaintiff the judgment of nonsuit should have been allowed, but as to the defendants the cause may be retained for adjustment of their rights as to the amount advanced to the association.

Reversed.

CLARKSON, J., dissenting.

SALISBURY HOSPITAL, INCORPORATED, v. ROWAN COUNTY.

(Filed 28 June, 1933.)

Taxation B d—Hospital not a charitable association nor its property used exclusively for charity held not exempt from taxation.

The property of a hospital organized as a business corporation and charging all patients according to a fixed schedule is held not exempt from taxation, N. C. Code, 7971(17), 7971(18), although patients unable to pay were relieved of payment and classed as charity patients, and although its stockholders, though not waiving their right to dividends, did not expect to receive dividends when they subscribed for stock, and no dividends were paid thereon for the years for which taxes were assessed, the hospital not being a charitable corporation, nor its property used entirely for charitable purposes, Art. V, sec. 5.

APPEAL by plaintiff from *Barnhill, J.,* at January Term, 1933, of ROWAN. No error.

The plaintiff is a corporation organized under the laws of this State, with its principal office and place of business in the city of Salisbury, Rowan County, North Carolina. It has an authorized capital stock of $250,000, divided into 2,500 shares, each of the par value of $100.00. It was authorized to begin business when $60,000 of its capital stock had been subscribed for. Stock for this amount was subscribed for by residents of the city of Salisbury, and the plaintiff began business as authorized by its certificate of incorporation in 1921. Since said date, the plaintiff has been and is now engaged in the business of operating a general hospital and conducting a training school for nurses in connection with said hospital in the city of Salisbury, N. C.

During the years 1929, 1930, and 1931, the plaintiff owned a lot of land, with the buildings located thereon, situate in the city of Salisbury; it also owned certain personal property, consisting of furniture and equipment in said buildings. This property, both real and personal, was used by the plaintiff in the operation of its hospital and in the conduct of its training school for nurses.

The defendant, Rowan County, caused the property owned by the plaintiff, both real and personal, to be assessed and listed for taxation during the years 1929, 1930, and 1931. The plaintiff has not paid the taxes levied on its property by the defendant for said years, and the defendant has advertised or threatens to advertise said property for sale for the collection of said taxes.

This action was begun on 12 April, 1932, for the purpose of obtaining a judgment declaring that the property, both real and personal, owned by the plaintiff, and used by it as a hospital and training school for nurses, during the years 1929, 1930, and 1931, was exempt from taxation by the defendant, for the reason that said property was used by the defendant, not for profit, but purely and completely for charitable purposes.

All the evidence at the trial tended to show that the plaintiff was organized as a business corporation, and not as a charitable association, and that plaintiff charged all patients admitted to its hospital according to a fixed schedule, and collected from such patients as were able to pay such charges, but that it did not attempt to collect such charges from patients who were found upon investigation to be unable to pay. Patients were classified by plaintiff as pay patients and as charity patients. The latter were relieved of all charges made against them. No profit was made by plaintiff from its business during the years 1930 and 1931. A profit was realized by plaintiff from its business during the year 1929. This profit was applied as a payment on plaintiff's indebtedness. No dividend was paid by plaintiff during the years 1929, 1930, or 1931, to its stockholders. There was evidence tending to show that stockholders of the plaintiff, at the time they subscribed and paid for their stock, did

not expect to receive dividends, but there was no evidence tending to show that stockholders had waived their right to dividends, or that plaintiff by corporate action had dedicated its property, real or personal, exclusively to charitable purposes.

The issue raised by the answer of the defendant to the complaint in this action, was submitted to the jury and answered as follows:

"Was the plaintiff during the years 1929, 1930, and 1931 a hospital conducted entirely and completely as a charitable institution, as alleged in the complaint? Answer: No."

From judgment (1) that plaintiff was not a charitable organization during the years 1929, 1930, and 1931, as alleged in the complaint; (2) that the property, real and personal, described in the complaint, was not exempt from taxation by the defendant during said years; (3) that defendant be not enjoined or restrained from collecting the taxes levied by defendant on said property for said years; and (4) that defendant recover of plaintiff its costs in this action, the plaintiff appealed to the Supreme Court.

Lee Overman Gregory for plaintiff.

Craige & Craige and Charles Price for defendant.

CONNOR, J. In *Latta v. Jenkins,* 200 N. C., 255, 156 S. E., 857, it is said: "By virtue of the provisions of section 3 of Article V of the Constitution of North Carolina, all property, real and personal, in this State, is subject to taxation, in accordance with a uniform rule, under laws which the General Assembly is required by the Constitution to enact, without regard to its ownership, and without regard to the purposes for which specific property is held, unless exempted by or under the provisions of section 5 of said Article. The provisions of said section that property belonging to or owned by the State or municipal corporations, shall be exempt from taxation, is self-executing and requires no legislation to make it effective. *Andrews v. Clay County,* 200 N. C., 280, 156 S. E., 855. Under this section, the General Assembly may exempt property in this State held for educational, scientific, literary, charitable or religious purposes. The power of exemption thus conferred on the General Assembly by the Constitution, to be exercised in its legislative discretion, may be exercised to the full extent, or in part, or not at all, as the General Assembly may determine. The general rule established by the Constitution is that all property in this State is liable to taxation, and shall be taxed in accordance with a uniform rule. Exemption of specific property, because of its ownership by the State or by municipal corporations, or because of the purposes for which it is held and used, is exceptional. The mandatory constitutional provision that property belonging to or owned by the State or municipal

corporations shall be exempt from taxation is in language so clear and free from ambiguity that ordinarily there is no room for construction as to its application to specific property. *Southern Assembly v. Palmer*, 166 N. C., 75, 82 S. E., 18. Statutes enacted by the General Assembly exempting specific property from taxation, because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation, *Trustees v. Avery County*, 184 N. C., 469, 114 S. E., 696; *United Brethren v. Commissioners*, 115 N. C., 489, 20 S. E., 626. Exemption of specific property from taxation because of the purposes for which it is held and used, is a privilege, which the General Assembly has the power to confer on its owner or owners, within the limitations of the Constitution of the State. In the absence of a clearly expressed intention on the part of the General Assembly to confer this privilege of exemption from taxation, with respect to specific property, such property is subject to taxation in accordance with the general rule that all property in this State is liable to taxation for the purpose of supporting the government of the State, or of its political subdivisions."

Applying the foregoing principles to the facts shown by all the evidence at the trial of this action, we are of opinion that there was no error in the instruction of the court with respect to the issue submitted to the jury. There was no evidence tending to show that the property, real or personal, owned by the plaintiff, and used by it in the operation of its hospital and in the conduct of its training school for nurses, was exempt from taxation under the provisions of C. S., 7971(17) and C. S., 7971(18). The plaintiff is not a charitable association, nor was its property used by it entirely and completely for charitable purposes. For that reason it was not exempt from taxation by the defendant. The judgment is affirmed.

No error.

STATE v. F. P. McCLURE.

(Filed 28 June, 1933.)

1. Evidence J a—

Parol evidence is competent to show that a contract not required to be in writing was partly written and partly oral, and parol testimony of the unwritten part is competent if not contradictory to the written terms.

2. Embezzlement B c—Parol evidence of agreement for application of funds held competent when not contradictory to written terms of agreement.

In this prosecution for embezzlement, C. S., 4268, the State introduced the written contract between defendant and prosecuting witness whereby

defendant agreed to buy a lot and build a house thereon for prosecuting witness at a stipulated price, the lot not to cost over an amount named, and the prosecuting witness agreed to execute a note secured by deed of trust on other property for part of the contract price and to pay the balance upon completion of the contract. Defendant discounted the note and paid a much smaller sum on a contract to purchase the lot, but failed to pay the purchase price or to obtain title thereto. The State introduced oral testimony of prosecuting witness, over defendant's objection, tending to show that the parties agreed that the full proceeds of the note should be used to pay the purchase price of the lot. *Held,* the parol testimony was competent, it not being in contradiction of the written terms of the agreement, the written agreement containing no stipulation as to the specific application of the funds.

3. Criminal Law L d—

Where the charge of the trial court is not in the record it is presumed correct.

STACY, C. J., concurring.

BROGDEN, J., concurs in concurring opinion.

APPEAL by defendant from *McElroy, J.,* at October Term, 1932, of AVERY. No error.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

E. F. Watson, Morgan, Stamey & Ward and Byron E. Williams for defendant.

ADAMS, J. The defendant was indicted for the embezzlement of twelve hundred and fifty dollars entrusted to him by Mary E. Loven as her agent, employee, or servant. C. S., 4268.

Mrs. Loven employed the defendant to buy a lot in Elizabethton, Tennessee, and to build a house on it, and to this end they executed a written contract. Accordingly, the defendant agreed to purchase the lot for Mrs. Loven at a price not to exceed $1,050 and to erect thereon a nine-room house at the price of $5,500. Mrs. Loven agreed to make her note in the sum of $1,250 to be secured by a deed of trust on her property situated in the town of Newland, North Carolina, payable ninety days from the date of the contract and to pay the remainder when the work was completed. She executed the note and the deed of trust and delivered them to the defendant and he discounted the note at a bank in Newland for twelve hundred dollars. Mrs. Loven selected the lot in Elizabethton and the defendant entered into a contract for its purchase; he paid $300 in cash and was to pay the remainder of the purchase price in six, twelve, and eighteen months, but he never paid the price or acquired the title.

With respect to the purchase Mrs. Loven was permitted to testify, subject to the defendant's exception, that the defendant was to apply the amount of the discounted note to the purchase of the lot, that this was the agreement between them, and that he misapplied the money and used it for other purposes. The defendant denied this and relied upon the terms of the written agreement.

The defendant in compliance with the statute made the usual motions to dismiss the action upon all the evidence. The motion was refused and defendant excepted. The jury convicted the defendant, the court pronounced judgment, and the defendant again excepted and appealed to this Court.

We need advert to only one exception—that which was taken to the court's refusal to dismiss the action; the others are formal. With respect to the crucial exception the question is whether the judge should have excluded Mrs. Loven's testimony that by the terms of the contract the defendant was to pay for the lot out of money he received on the discounted note, the defendant contending that the testimony was in contravention of the written contract. The contested provision is in these words: "The purchaser (Mrs. Loven) agrees to make note secured by deed of trust on property located in town of Newland . . . in the sum of $1,250 due and payable 90 days from date of the contract and agrees to pay the balance of $4,650 on completion of this contract."

The writing contains no provision for the specific application of the money which the defendant received on the note; on this point the contract is ambiguous or at least indefinite. If, as the State contends, the parties agreed that this money should be used in the purchase of the lot, such contemporaneous agreement did not necessarily contradict or vary the terms of the written agreement; and if it did not the testimony excepted to was competent. When a contract is not required to be in writing it is permissible to show by parol testimony that the contract was partly oral and partly written. *Garland v. Improvement Co.,* 184 N. C., 551; *Anderson v. Nichols,* 187 N. C., 808; *Hite v. Aydlett,* 192 N. C., 166; *Crown Co. v. Jones,* 196 N. C., 208.

The testimony of Mrs. Loven in reference to the application of the money paid on the note was admissible; and on the controverted question an issue of fact was sharply drawn between the State and the defendant. The jury adopted the State's theory and found that the defendant after receiving the money to be applied to a specific purpose misapplied or converted it to his own use. As the charge of the court was not excepted to or sent up with the record we must assume that the law was correctly explained and applied. *Spinks v. Ferebee,* 193 N. C., 274; *Thomas v. Bus Line,* 194 N. C., 798.

No error.

STACY, C. J., concurring: It may be doubted whether the evidence raises more than a suspicion, somewhat strong perhaps, of the defendant's guilt, which under the decision in *S. v. Carter,* 204 N. C., 304, and cases there cited, would not be sufficient to carry the case to the jury. But as the attempted appeal is *in forma pauperis* and the affidavit omits to state "the application is in good faith," the Court is without jurisdiction to entertain the appeal. *S. v. Martin,* 172 N. C., 977, 90 S. E., 502.

The sufficiency of the affidavit may not be waived, as it is jurisdictional. *Powell v. Moore,* 204 N. C., 654; *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

The defendant is not vitally interested in whether the judgment is affirmed or the appeal dismissed, as the result to him would be the same in either event. *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32.

BROGDEN, J., concurs.

WILLIAM H. OATES v. WACHOVIA BANK AND TRUST COMPANY ET AL.

(Filed 28 June, 1933.)

1. Libel and Slander D e—Whether words used charged crime within reasonable apprehension of hearers held question for jury.

The payee took plaintiff's check to defendant bank and requested that it be cashed. The teller went over to the assistant trust officer and assistant secretary of defendant, and then the payee was called over to him, and the officer said in a loud voice "you know O's check is no good; all they have is what they get from the old lady, or beat the old lady out of." *Held,* under the attendant circumstances the words were fairly susceptible of the meaning, within the understanding of those within hearing, of a charge of issuing a worthless check, which is a misdemeanor, or when done with intent to defraud, involves moral turpitude, and the question of the meaning of the words used, within the understanding of those within hearing, considering their knowledge of the facts and the attendant circumstances, is held a question for the jury.

2. Same—Whether words are actionable per se is for court when they have only one meaning, otherwise their meaning is for the jury.

Where words spoken are actionable *per se* defamation and damage are conclusively presumed, but if actionable only *per quod,* malice and special damage must be alleged and proven, and where the words are susceptible of only one interpretation the question of whether they are actionable *per se* is for the court, while if they are susceptible of two interpretations, one actionable *per se* and the other not, it is for the jury to determine which of the two meanings was intended and so understood within the reasonable apprehension of the hearers.

CLARKSON, J., not sitting.

OATES *v.* TRUST CO.

APPEAL by plaintiff from *Cowper, Special Judge,* at August Special Term, 1932, of HENDERSON.

Civil action for slander.

The record discloses that on 2 April, 1931, the plaintiff, a licensed attorney, who lives in Hendersonville, gave to O. V. Powers, chief of police of that city, a check for $200 drawn upon the Commercial National Bank of Charlotte, N. C., made payable to the order of "cash," and requested, at the time, that the check be not cleared through a Hendersonville bank.

A short time thereafter, the chief of police was in Asheville and knowing that the Wachovia Bank and Trust Company had, in the past, looked after the plaintiff's business in Hendersonville, presented said check to the teller and asked that it be cashed. At first, the teller started to cash the check, but, before doing so, went back to the desk where C. N. Walker, assistant trust officer and assistant secretary of the corporate defendant, was sitting, and after conversing with him, called the chief of police over to Walker's desk.

Walker said to Powers in a rough tone of voice and loud enough to be heard by employees and customers of the bank present in the lobby, "You know William Oates' check is no good." Powers replied that the check had been given to him at the instance of Mrs. Oates, and for reasons satisfactory to himself, he knew it was good. Walker replied: "Well, all they have is what they get from the old lady," or "beat the old lady out of." Powers, continuing, testified: "It seemed that he was mad at Mr. Oates; did not have any use for him and said it as hateful as he could. He spoke as if he knew the check was no good. His manner was not at all pleasant."

Powers took the check from Walker's hand with the statement, "I will get it cashed somewhere else." He stopped at Fletcher on his way home and had the check cashed by the bank there. It was duly paid by the drawee bank upon presentation and was good at the time of its execution and delivery.

It was further in evidence that plaintiff's mother had executed a living trust with the corporate defendant, and had sought, on one or two occasions, to modify it for the benefit of the plaintiff, but the corporate defendant had declined to consent to such modification, and the said C. N. Walker was familiar with said trust agreement and acquainted with the affairs of said trust estate.

It is alleged that the animus of the defendants arises from a desire to deprive the plaintiff of certain rights under this trust agreement.

Plaintiff appeals from a judgment of nonsuit entered at the close of his evidence.

R. L. Whitmire for plaintiff.

M. M. Redden, Shipman & Arledge and Bourne, Parker, Arledge & DuBose for defendants.

STACY, C. J. Are the words "You know William Oates' check is no good; all they have is what they get from the old lady, or beat the old lady out of," viewed in the light of the circumstances under which they were spoken, fairly susceptible of the meaning, within the understanding of those to whom they were addressed or published, that the speaker meant to charge, and, by fair intendment, did charge, the maker with having uttered a worthless check? We think so. *Castelloe v. Phelps,* 198 N. C., 454, 152 S. E., 163.

It is a misdemeanor for any person knowingly to utter a worthless check in this State. Chap. 62, Public Laws, 1927; *S. v. Yarboro,* 194 N. C., 498, 140 S. E., 216. And such act involves moral turpitude if done with intent to defraud. C. S., 4283 and 4173; *S. v. Yarboro, supra; Jones v. Brinkley,* 174 N. C., 23, 93 S. E., 372; *Gudger v. Penland,* 108 N. C., 593, 13 S. E., 168; *Barnett v. Phelps,* 97 Ore., 242, 191 Pac., 502, 11 A. L. R., 663; 17 R. C. L., 265, *et seq.*

Even so, the defendants contend that the charge of uttering a worthless check is actionable *per quod* and not *per se. Deese v. Collins,* 191 N. C., 749, 133 S. E., 92; *Payne v. Thomas,* 176 N. C., 401, 97 S. E., 212; *Gudger v. Penland, supra; McKee v. Wilson,* 87 N. C., 300; *Pegram v. Stoltz,* 76 N. C., 349; *Hurley v. Lovett,* 199 N. C., 793, 155 S. E., 875; *Pollard v. Lyon,* 91 U. S., 225; Note, 12 Am. Dec., 39, *et seq.;* 17 R. C. L., 264. The difference between the two is, that if actionable *per se,* malice and damage are conclusively presumed, but if actionable only *per quod,* both malice and special damages must be alleged and proved. *Walker v. Tucker,* 220 Ky., 362, 295 S. W., 138, 53 A. L. R., 547.

However this may be, the plaintiff says there is evidence of falsity, malice and special damages on the present record sufficient to overcome the demurrer. *Deese v. Collins, supra; Newberry v. Willis,* 195 N. C., 302, 142 S. E., 10; *Pentuff v. Park,* 194 N. C., 146, 138 S. E., 616, 53 A. L. R., 626; *Elmore v. R. R.,* 189 N. C., 658, 127 S. E., 710; *Pollard v. Lyon, supra.* The defendants contend otherwise.

The decisions are to the effect that a publication claimed to be defamatory should be considered in the sense in which those to whom it was addressed, or who heard it, would ordinarily understand it. When thus considered, if its meaning be such as to bear but one interpretation, it is for the court to say whether that signification is defamatory. On the other hand, if it be capable of two meanings, one actionable and the other not, it is for the jury to determine which of the two was in-

tended and so understood by those to whom it was addressed or by whom it was heard. *Washington Post Co. v. Chaloner,* 250 U. S., 290; *Publishing Co. v. Smith,* 149 Fed., 704. The circumstances of the publication are to be considered. *Riddell v. Thayer,* 127 Mass., 487. And the hearers' knowledge of facts which would influence their understanding of the words used is also pertinent. *Sydney v. Pub. Corp.,* 242 N. Y., 208. Indeed, it has been held in this jurisdiction (as stated in 2nd headnote, *Webster v. Sharpe,* 116 N. C., 466, 21 S. E., 912) that words spoken to a person or in his presence, which, taken in connection with the whole conversation, amount to a charge of a crime (storebreaking), to the reasonable apprehension of the persons hearing them, are slanderous and defamatory, although they do not, in terms, charge the crime. See, also, 17 R. C. L., 266. The case is one for the jury. 17 R. C. L., 307.

Reversed.

CLARKSON, J., not sitting.

BESSIE MILLER, ADMINISTRATRIX OF LEMUEL SCOTT, DECEASED, v. SOUTHERN RAILWAY COMPANY AND B. C. PATTON.

(Filed 28 June, 1933.)

Railroads D b—Last clear chance is inapplicable in absence of evidence that injury could have been avoided after reasonable discovery of peril.

Peril and the discovery of such peril in time to avoid the injury is the basis of the doctrine of the last clear chance, and the burden upon the issue is on plaintiff and the issue should not be submitted unless there is evidence to support it, and where, in an action to recover for intestate's death resulting from a collision between his car and defendant's train at a grade crossing, the evidence viewed favorably to plaintiff fails to show that the engineer could have stopped the train and avoided the injury after he saw or could have seen, in the exercise of due care, intestate's car on the tracks, the submission of the issue of the last clear chance is error.

CLARKSON, J., dissenting.

CIVIL ACTION, before *Stack, J.,* at September Term, 1932, of FORSYTH.

The evidence tended to show that Lemuel Scott, plaintiff's intestate, was killed at the Muddy Creek grade crossing in Forsyth County on or about 12 January, 1931, by a train of the defendant, Southern Railway Company, operated at the time by the defendant, B. C. Patton, the locomotive engineer. The physical facts and situation were described by Mr. Hill, a civil engineer, who testified for the plaintiff. He said: "The

highest point of this embankment, back some four or five hundred feet from the crossing toward Winston-Salem, is twelve feet above the railroad. . . . There is no shrubbery along the top of that embankment between this highway and the railroad. . . . The embankment of the railroad runs out level with the crossing practically at the crossing, and there is a gradually increasing embankment from there up the line towards Winston-Salem. At a distance of two hundred feet from the crossing, the embankment is about eight feet above the railroad tracks; at a distance of 150 feet from the crossing it is about seven feet above the railroad track; at a distance of 100 feet from the crossing it is five feet above the railroad track; four hundred feet from the crossing it is about twelve feet above the railroad track, which is about the maximum height of the embankment. The concrete highway is an ascending grade going toward Winston-Salem, and is higher than the railroad track. The sand-clay road as it leaves the hard surface and approaches the railroad is practically level with the railroad tracks, perhaps a little higher. . . . Standing on the railroad track at the crossing, on the side nearest the concrete highway, you can see four or five hundred feet up the railroad track toward Winston. The sand-clay road after it leaves the hard-surface road is approximately fifty or sixty feet from the railroad track. I observed the train coming around that cut while I was making this survey there. I was standing in the sand-clay road about twenty feet from the crossing, toward the hard-surface road, and I could see the top of the train all the way through the cut but couldn't get a full view of the train until it got within about 150 feet of the crossing. . . . I would say that the average engine running over that road is about fifteen feet high; that is, to the top of the cab." Another witness for plaintiff said: "I was standing in the road approximately twenty feet from the track on the west side of the track. I could see the smokestack of the engine as it came up over the grade approximately 400 feet away from the crossing. I could not see the front end of the engine from where I was standing more than about 300 feet up the track." The evidence tended to show that the deceased was driving a T Model Ford, and, while there was no eye witness to the accident, it appears from the evidence that after the collision the car was turned over on the left side of the railroad track and the body of the deceased was on the front of the engine. Another witness for plaintiff said that "the road between the tracks at the time of the accident was in fairly good condition, kinder rough like." Another said: "The road from the main highway across the railroad was rough, it had been sand-clayed and was very rough, broken up. The road over the crossing was very rough." Another witness said: "The crossing was muddy and rutty, pretty deep cuts."

The collision happened in the day time and there was evidence that "It was raining, heavy clouds, foggy, misting rain." A witness for plaintiff said: "It was cloudy and misting rain, kinder of a sleet. There was right much fog. The fog kinder settled over the highway. I was bothered some little going on about the fog." The plaintiff contended that Patton, the engineer, was practically blind as a result of cataracts upon his eyes. It appeared, however, without contradiction, that the cataract had been removed from Patton's eye on 15 April, 1929, and that in January, 1930, the engineer had normal vision with glasses in his right eye and considerable vision in his left eye. Patton was dead at the time of the trial.

Issues of negligence, contributory negligence, last clear chance and damages were submitted to the jury and answered in favor of plaintiff. Damages were awarded in the sum of $5,000 for the negligent killing and $45.00 injury to property. The jury answered the issue of last clear chance in the affirmative. The defendant excepted to submitting the issue of last clear chance.

From judgment upon the verdict in favor of the plaintiff the defendant appealed.

Forrest G. Miles and John C. Wallace for plaintiff.
John C. Wallace and Manly, Hendren & Womble for defendant.

BROGDEN, J. There was sufficient evidence of negligence and of contributory negligence, and as the jury answered both of these issues in the affirmative, the determinative question is whether the trial judge should have submitted to the jury the issue of last clear chance.

Peril and the discovery of such peril in time to avoid injury constitutes the back-log of the doctrine of last clear chance. Was the plaintiff's intestate in a situation of peril at the crossing? Did his car stall on the track? Did he look and listen before attempting to cross? The evidence does not speak upon any of these questions. Manifestly he was in a position of peril when his car was driven upon the track in the ordinary act of crossing, because the train was at hand. Consequently the inquiry must shift to the engineer of the train. How far was the train from the crossing when plaintiff's intestate entered upon the track? Could the engineer in the exercise of ordinary care have stopped the train and prevented the collision after he discovered or should have discovered that the intestate was attempting to cross the track or in a position of peril or so obviously insensible of impending danger as to put the engineer on guard? The evidence does not speak clearly on any of these questions, although there are certain uncontradicted excerpts of testimony which shed light upon the situation. The fireman declared that

the engineer "could have seen the car when he saw the car was going to come on across anyway he threw his brakes in emergency." The fireman further said: "At the time he applied his brakes in emergency he was fifty to one hundred feet from the crossing." The trainmaster said: "From my experience, under the conditions existing at this crossing on the morning of the accident, if the train approached this crossing at a speed of thirty miles an hour, if the brakes were applied in emergency, everything working one hundred per cent, the train could not have been stopped in my opinion, in less than seven hundred and fifty to a thousand feet, which would be from three to four train lengths. That train was approximately 250 feet long. The lighter the train, the less momentum, and the quicker you can stop the train; you could stop a train quicker with three cars and a locomotive than you could with ten cars, because the weight and momentum is less." The foregoing excerpts from the testimony were uncontradicted and constitute the sole evidence upon the points indicated.

The burden of the issue of last clear chance is upon the plaintiff, and such issue is not applicable unless there is evidence to support it. *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829. A liberal interpretation of the testimony fails to disclose any evidence that the engineer could have stopped the train or prevented injury after he should have discovered, in the exercise of ordinary care, that plaintiff's intestate was in a position of peril. Therefore, the issue of last clear chance should not have been submitted to the jury. See Duke Bar Association Journal, May, 1933, p. 84.

Error.

CLARKSON, J., dissenting.

C. R. HOWARD, JR., v. THE TEXAS COMPANY, E. G. LEE, AND NORTH CAROLINA OIL COMPANY.

(Filed 28 June, 1933.)

1. Negligence A c—Res ipsa loquitur held to apply to explosion in tanks or pipes of filling station under exclusive control of defendants.

The fact of an explosion in the tanks or gasoline pipes of a filling station under the exclusive control and operation of defendants is sufficient to invoke the doctrine of *res ipsa loquitur*, and overrule defendant's motion as of nonsuit in plaintiff's action to recover for property damage resulting therefrom, leaving the question of whether negligence will be inferred from the fact of the explosion for the determination of the jury.

2. Appeal and Error J g—

Exceptions to the admission of certain evidence in this case are not considered on appeal as the case must be tried on its merits, the judgment as of nonsuit entered in the trial court being reversed.

CIVIL ACTION, before *Alley, J.*, at February Term, 1933, of BUNCOMBE.

The plaintiff is a citizen and resident of Tennessee. The defendant, Texas Company, is a corporation organized and existing by virtue of the laws of the State of Delaware and is duly authorized to conduct business in Buncombe County. The defendant, North Carolina Oil Company, is a North Carolina corporation and was engaged in the business of operating a filling station in Buncombe County at the northeast corner of Broadway and Walnut streets in the city of Asheville, under a license from the Texas Company. The defendant, E. G. Lee, was manager in charge of the business of the North Carolina Oil Company.

On 31 March, 1931, the plaintiff, a traveling salesman, registered as a guest at the Webster Hotel in Asheville. This hotel is located at the southeast corner of Broadway and Walnut streets. Across the street from the hotel was a filling station, operated by the defendant, North Carolina Oil Company, which was engaged in selling petroleum products of the Texas Company. The plaintiff was the owner of a Dodge automobile, and when he registered at the hotel, parked his car on the south margin of Walnut Street directly opposite said filling station. At about eleven o'clock on the night of 31 March, and after the filling station had been closed for the day's business, "there occurred upon the premises of said filling station a terrific explosion, which said explosion tore off a section of iron pipe which was an old fill pipe, extending some four or five feet above the ground and led into the gasoline tanks of the filling station located underneath the ground. That said pipe was an iron pipe about two inches in diameter and the section blown off was from two to three feet in length. That the force of the explosion broke said pipe into numerous fragments ranging in size from a piece of about the size of a human hand down to smaller fragments about the size of small pebbles. That the said fragments of iron pipe scattered in various directions and numerous fragments were hurled directly across the street to where the plaintiff's car was parked, striking plaintiff's car and severely damaging it, in that the glass in the doors was broken, several holes were punctured in the body of the car, the gasoline tank was punctured. . . . That said car of plaintiff at the time of the explosion was practically new." Other evidence tended to show that the force of the explosion broke several windows in the hotel, and that one fragment of iron was blown through a window on the second floor of the hotel, lodging in the ceiling of one

of the rooms. "That the force or concussion of said explosion was so violent that it threw some of the guests of the hotel out of their chairs in which they were sitting in the lobby of the hotel at the time of the explosion."

A deputy fire insurance commissioner, witness for the plaintiff, was asked the following questions: (Q.) "Do you have an opinion satisfactory as to whether the explosion occurred inside the storage tank or inside the pipe, and, if so, give that opinion?" (A.) "The fragment just referred to was cracked or split on the inside of the pipe, and from the condition of said fragment the explosion occurred inside the storage tank or inside the tank pipe." (Q.) "State whether, in your opinion, from the investigation you made, the explosion occurred inside the pipe or as a result of some external force or explosive." (A.) "I have several years' experience with dynamite, gun powder and other high explosives, and, in my opinion, the explosion occurred inside the pipe and not as a result from any external force or explosive."

The defendant objected and excepted to the ruling of the court in admitting the evidence. There was a similar opinion of like tenor and import given by the agent of the fire department of Asheville, which was admitted over the objection of defendant.

The cause was originally tried in the county court and nonsuited. Upon appeal to the Superior Court the trial judge reversed the judgment of the county court and remanded the cause for trial. From such judgment the defendant appealed.

John Y. Jordan, Jr., for plaintiff.
Johnson, Smathers & Rollins for defendant.

BROGDEN, J. Does the doctrine of *res ipsa loquitur* apply to explosions of the type described in the evidence?

There was no evidence that the filling station, tanks or pipes were negligently installed or operated, or that there was any defect in the station or its equipment. Consequently, unless the principle of *res ipsa loquitur* is applicable, the trial judge was in error in reversing the judgment of nonsuit and remanding the case for trial. The evidence leaves no doubt as to the fact that the filling station and its equipment and fixtures were under the exclusive control of the defendants. It is also a matter of everyday knowledge that filling stations, tanks and pipes properly installed, inspected, supervised and carefully operated, do not usually and ordinarily blow up. Therefore, the evidence discloses a typical background for the application of *res ipsa loquitur*. Indeed, this Court is committed to the view that explosions, such as the testimony describes, invoke the application of the principle. *Fox v. Texas Co.,*

180 N. C., 543, 105 S. E., 437; *Stone v. Texas Co.,* 180 N. C., 546, 105 S. E., 425; *Newton v. Texas Co.,* 180 N. C., 561, 105 S. E., 433; *Harris v. Mangum,* 183 N. C., 235, 111 S. E., 177. In the *Harris case, supra, Adams, J.,* wrote: "We are not inadvertent to decisions in which it is held that the doctrine of *res ipsa loquitur* does not apply in case of injury or death caused by the explosion of a boiler; but in our opinion the better reasoning, as well as eminent judicial opinion, supports its application. The principle is embedded, not in the relation existing between the parties, but in the inherent nature and character of the act causing the injury." The opinion further declares: "In applying the maxim confusion has frequently arisen from a failure to observe the distinction between circumstantial evidence and the technical definition of *res ipsa loquitur.* This distinction is not merely theoretical; it is practically important. *Res ipsa loquitur,* in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident are sufficient to carry the case to the jury on the bare question of negligence. But where the rule does not apply, the plaintiff must prove circumstances tending to show some fault of omission or commission on the part of the defendant in addition to those which indicate the physical cause of the accident."

Of course, the jury is not obliged or compelled to infer negligence or want of due care from the fact of the explosion, but the law means to say that negligence may be inferred from such fact. See *Hinnant v. Power Co.,* 187 N. C., 288, 121 S. E., 540.

There is certain opinion evidence in the record admitted by the trial judge. Apparently these opinions were based upon very meager data and would seem to be almost plucked out of the air, but as the case must be tried upon its merits, no opinion with reference to the competency of the evidence is intimated or expressed.

Affirmed.

JACK H. AMMONS v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 28 June, 1933.)

Insurance M c—Insured failed to show that he had given proof of disability to proper agent of insurer, and nonsuit was proper.

Plaintiff sought to recover for permanent disability under a certificate of group insurance. The policy provided that proof of such disability must be furnished the company within one year thereof. Plaintiff's evi-

dence tended to show that within the year he furnished the written statement of the attending physician which stated that the disability was not permanent, and that he orally stated his permanent disability to the paymaster in charge of disability claims for the employer, but who was not employed by the insurer. *Held*, the burden of proof was on plaintiff, and the written statement of the physician denied that the disability was permanent, and the oral proof was not shown to have been given a proper agent of the insurer, and the insurer's motion as of nonsuit should have been granted.

CIVIL ACTION, before *Clement, J.*, at November Term, 1932, of BUNCOMBE.

This action was instituted in the General County Court of Buncombe County upon certificate No. 3215-198, issued by the defendant pursuant to a group policy plan. This certificate provides, among other things, the following: "In the event that any employee while insured under the aforesaid policy and before attaining age sixty, becomes totally and permanently disabled by bodily injury or disease, and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of its commencement, the society will, in termination of all insurance of such employee under the policy, pay equal monthly disability installments, the number and amount of which shall be determined by the table of installments below."

The plaintiff was employed by the American Enka Corporation, and a group policy of insurance had been provided by said corporation for the benefit of its employees. The certificate issued to the plaintiff was for the sum of $500.00 and payable in ten monthly installments of $50.35 per month. The plaintiff alleged that he became disabled on or about 1 March, 1931, and that on or about 18 January, 1932, he consulted counsel and was advised that it was necessary for him to furnish due proof of total disability. In consequence thereof Dr. H. S. Ogilvie, of Asheville, filled out a blank designated as a group disability claim of defendant. This attending physician's statement, as shown on said blank, disclosed certain facts with respect to the claim of the claimant. Paragraph 11 of this statement contains two questions, as follows: (a) "Do you believe the claimant to be so disabled that he is wholly prevented for life from pursuing any and all gainful occupation?" The physician answered this question "No." (b) "Or is this total disability only temporary?" The physician answered this question "temporary." The plaintiff testified that he notified Mr. Cooke, who was paymaster for the American Enka Corporation. The testimony was: "He is not employed in any way by the insurance company, but he acts as free agent there, I would say, for the insurance company. He handles disability claims;

we take such action as we see fit in our office on the disability claims. . . . Some claims have been filed through Mr. Cooke. . . . He looks after them to a certain extent for the insurance company. . . . The notices under the life insurance policies are referred to the Insurance Company in New York." There was other evidence that Mr. Cooke was paymaster and in charge of the insurance of employees at the plant, and that he furnished the blank heretofore referred to.

Issues were submitted to the jury and answered in favor of plaintiff, and from judgment rendered the defendant appealed to the Superior Court upon certain exceptions. The trial judge after hearing the exceptions, declared: "This court finding that there was not sufficient evidence presented by the plaintiff in the lower court to go to the jury, and therefore, the defendant's motion for judgment as of nonsuit should have been sustained. . . . It is adjudged . . . and decreed that the judgment entered in this cause by the judge of the General County Court be, and the same is hereby reversed and the cause remanded to the said court to the end that a judgment be entered therein in accordance therewith."

From the foregoing judgment plaintiff appealed.

Edward H. MacMahan for plaintiff.
Bourne, Parker, Bernard & DuBose for defendant.

BROGDEN, J. The principles of law applicable to the facts are well settled and the merits of this cause rest solely upon an interpretation of the evidence in the record.

In order to recover the benefits provided in the policy it was necessary for plaintiff to offer evidence tending to show: (1) permanent disability, and (2) due proof thereof within a period of one year from the date of the commencement of the disability. There was sufficient evidence of permanent disability within the contemplation of the terms of the policy of insurance, and the vital question is whether due proof was furnished within one year. The testimony tended to show that the disability commenced about March, 1931. In January, 1932, the plaintiff undertook, as he contends, to furnish proof thereof. Such proof consists of two elements: (a) the written statement of the attending physician, and (b) verbal statements to Mr. Cooke, paymaster of the Enka Corporation which employed the plaintiff and procured the group insurance. The written statement of the physician expressly declares that the plaintiff was not totally and permanently disabled and that the total disability was only temporary. Hence, the written proof furnished put the plaintiff out of court. However, the policy does not require that written proof should be furnished, and the plaintiff undertook to show that

verbal proof of disability was given within the one-year period. Manifestly such verbal proof should have been given to a proper agent of defendant. The testimony is to the effect that the oral declarations of disability were given to the paymaster of the Enka Corporation, who was "not employed in any way by the insurance company." There is evidence tending to show that Mr. Cooke looked after certain disability claims of employees of the corporation, but it does not appear whether such activities were performed in behalf of the corporation or of the defendant insurance company.

The burden of proof was upon the plaintiff, and as we interpret the record, there was no evidence that due proof of total disability has ever been furnished by the plaintiff to the defendant insurance company. Therefore, the ruling of the trial judge was correct.

Affirmed.

LILLY BELLE NEWMAN, BY HER NEXT FRIEND, D. F. NEWMAN, v. QUEEN CITY COACH COMPANY.

(Filed 28 June, 1933.)

1. Automobiles C j—In order to impute negligence to passenger he must have control of car amounting substantially to joint possession.

In order for the negligence of the driver of a car to be imputed to a passenger riding therein it is necessary that the passenger have such control over the car as to be substantially in joint possession of it, and the fact that driver and passenger have a common enterprise in riding is not sufficient.

2. Automobiles C f—Evidence of failure to slacken speed under circumstances held to raise issue of negligence for jury.

Plaintiff's evidence, contradicted by defendant, that the driver of defendant's bus did not slacken his speed but drove straight into the car in which plaintiff was riding although he saw the car as a dark object in the road at night when three hundred feet therefrom is held to raise an issue for the jury.

3. Trial E e—

Where requested instructions are substantially given in the charge the refusal to give the instructions as requested will not be held for error.

4. Automobiles C f—Act of driver in turning car around at night on populous highway where there is no intersection is negligence.

The act of the driver in attempting to turn his car around at night on a populous highway at a place where there is no intersecting highway is negligence, and when the sole proximate cause of injury to a passenger in his car bars the passenger's right to recover against the driver of the other car involved in the collision.

CIVIL ACTION, before *Oglesby, J.*, at August Term, 1932, of UNION.

The action was instituted for the recovery of damages for personal injury sustained by the plaintiff in a collision between the car in which she was riding as a guest, and a bus owned and operated by the defendant. The collision occurred in the night time and the details thereof as given by the plaintiff are substantially as follows: "On the night of 9 February I had occasion to go to Indian Trail with the basketball team and went with Herman Gaddy, Pauline Griffin and Katherine Trull in Mr. Gaddy's car. He is teacher at Benton Heights School, and also coach of the basketball team. I did not pay Mr. Gaddy anything to carry me up there. I was really a guest in his car and had no control at all over it. Somewhere between Stouts and Indian Trail Mr. Gaddy turned his car around in the road. I did not tell him to, but it was suggested that he turn around, and before the turn was made I looked both ways on the road and there was nothing in sight. We started making the turn and we were almost turned around, pulling up toward Monroe, just barely moving, when over the hill we saw this bus, and I told him there was a car coming, and when we turned around in the road I observed another car coming from toward Monroe and saw the bus coming over the hill that way. . . . The bus was coming fast, very fast, . . . and from the time it came over the hill it did not decrease its speed, it was the same. The bus did not turn in the road, it came straight on. At the time the bus came over the hill we were turning toward Monroe, we hadn't pulled off yet, we had about turned. The car had gotten across the center of the road and was on Mr. Gaddy's right of the center, on that side. The distance from the top of that hill to the place where the car was struck is, I should say, about 300 feet, somewhere around that." There was a conflict in the evidence with regard to the extent of plaintiff's injury. She testified that she was seriously and permanently injured and there was testimony to the contrary.

The evidence for the defendant tended to show that the driver of the bus was keeping a careful lookout, and when he came to the top of the hill he saw a dark object in the road ahead. In the meantime a truck with brilliant lights was approaching the dark object and the driver contended that this prevented him from discovering that the dark object was an automobile attempting to turn around on a populous highway in the night time. The driver further testified that he did not discover that the dark object was an automobile until he was very close to it, and that the oncoming truck with the bright lights, interfered with his vision, and also with his ability to turn the bus so as to avoid striking the car. The bus struck one of the hind wheels of the car, and the injuries resulted from the impact.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. There was an award of damages in the sum of $2,500, and from judgment upon the verdict the defendant appealed.

Vann & Milliken for plaintiff.
John C. Sikes for defendant.

BROGDEN, J. The contention that the plaintiff and the driver of the car were engaged in a joint enterprise is not sustained. "A common enterprise in riding is not enough. The circumstances must be such as to show that the plaintiff and the driver had such control over the car as to be substantially in the joint possession of it." *Charnock v. Refrigerating Co.,* 202 N. C., 105, 161 S. E., 707; *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5. Likewise the judge ruled correctly in submitting the cause to the jury. The evidence for plaintiff tended to show that, when the bus arrived at the top of the hill, 300 feet away, the driver did not slaken his speed, but drove straight ahead into the car. Upon this point the evidence of the driver and of the passengers in the bus was directly to the contrary. Hence an issue arose for the determination of the jury.

In apt time the defendant requested the court to charge the jury as follows: "If you find from the evidence that the sole and proximate cause of plaintiff's injury was due to the negligence of the driver of the automobile occupied by her, in turning around on Highway No. 20 in the night time, at the point where he did turn around, and that this, and this alone, was the proximate cause of her injury, you should answer the first issue 'No.'" The record discloses that the court declined to give this instruction.

As the evidence shows that the driver of the car undertook to turn around in the night time upon a populous highway at a point where there was no intersecting road, the defendant was entitled to have such instruction given the jury. However, it appears that such instruction was substantially given subsequently in the charge, in almost the exact language of the prayer. Therefore, the assignment of error is not sustained.

There are other exceptions in the record, but a careful examination does not disclose that any of them warrants a new trial.

No error.

MRS. MOLLIE PENDERGRAPH v. EUGENE DAVIS.

(Filed 28 June, 1933.)

Trial G c—

After the trial court has left the bench upon the adjournment of the term he may not, without notice to the adverse party, sign an order outside the courtroom modifying a judgment upon a jury verdict rendered during the term.

CIVIL ACTION, before *Hill, Special Judge,* at November Term, 1932, of ALAMANCE.

The plaintiff instituted this action against the defendant to recover the purchase price of certain personal property which she alleged that she and her deceased husband owned and sold to the defendant for $400.00. The defendant pleaded payment and counterclaim. Six issues were duly submitted to the jury. The jury found that the plaintiff and her deceased husband were the owners of the property and sold the same to the defendant for $400.00, that the defendant had paid on said purchase price $60.00, and that the defendant had rendered service to A. S. Pendergraph, deceased husband of plaintiff, and was entitled to recover $50.00 for such service. Whereupon judgment was entered in favor of the plaintiff for the sum of $290.00 and interest.

The record shows the following: "The trial of this case was completed and judgment signed as above set out on Wednesday, 23 November, 1932, and being the day before Thanksgiving, court adjourned for the term on that date. After the adjournment of the court his Honor, Frank S. Hill, judge, returned to his hotel in the city of Burlington, and on Thursday, 24 November, 1932, . . . the plaintiff through her counsel and in the absence of the defendant, and without notice to the defendant or his counsel, presented this matter to his Honor . . . at his room in the hotel in Burlington, with reference to the alleged retention of title to the property referred to in the judgment, and at that time after the court had adjourned, as aforesaid, and his Honor had arisen from the bench and was not in the court but was in his hotel room in Burlington, he signed an order in this cause modifying the judgment," etc. This order recites that no issue had been submitted to the jury as to the existence of a title retained contract between the plaintiff and the defendant, as to the personal property specified in the complaint, and the trial judge being of the opinion that the evidence did disclose testimony tending to show the existence of such a contract, and that an appropriate issue should have been submitted to the jury, ordered and adjudged that the judgment "heretofore entered in this cause be, and the same is hereby modified, to the end that a new trial

may be had for the purpose of submitting to the jury the issue as to the existence of a title retained contract," etc.

The defendant in apt time excepted to the action of the judge in signing the foregoing order and appealed.

No counsel for plaintiff.
Long & Long for defendant.

BROGDEN, J. Can a trial judge, after the business of the court is terminated and he has left the bench for the term, sign an order modifying a judgment upon a jury verdict rendered during the term, and without notice to the adverse party?

The law answers the question in the negative. *Branch v. Walker,* 92 N. C., 87; *Dunn v. Taylor,* 187 N. C., 385, 121 S. E., 659; *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1; McIntosh North Carolina Practice & Procedure, p. 691, section 620. McIntosh says: "In jury cases the judgment must be rendered at term, unless the parties consent otherwise; and where the parties consent that the judge may render judgment out of term, it relates to the term, and, as between the parties, is as valid as if rendered at term. 'At term' means while the court is in session, and the judge is not authorized to render judgments outside of the courtroom and when the court is not in session, except by consent of the parties, unless it is a matter which properly comes before him at chambers."

Reversed.

G. S. MILES COMPANY v. L. R. POWELL, JR., AND E. W. SMITH, RECEIVERS FOR SEABOARD AIR LINE RAILWAY.

(Filed 28 June, 1933.)

Courts B b—Greensboro Municipal Court held without jurisdiction to issue summons out of county in action within justice's jurisdiction.

The municipal court of Greensboro given the jurisdiction of a justice's court in civil actions on contract where the amount demanded does not exceed two hundred dollars exclusive of interest, chapter 126, Private Laws of 1931, has no jurisdiction to issue summons outside the county in an action embraced in the justice's jurisdiction when all the defendants reside outside the county, C. S., 1489, 1490, and this result is not altered by the provisions of chapter 126, section 34, Private Laws of 1931, the section being construed in relation to other sections, and C. S., 1489, 1490 not being specifically mentioned in chapter 126, and therefore retaining their vitality.

CIVIL ACTION, before *Harding, J.,* at October Term, 1932, of GUILFORD.

On 21 July, 1932, the clerk of the civil division of the municipal

court of the city of Greensboro issued a summons to the sheriff of Lee County. Said summons was issued pursuant to a petition filed by the plaintiff in said court, alleging that the plaintiff had a claim of less than $200.00 against said receivers, and that said receivers and the defendant had no process agent within Guilford County. A complaint was filed, claiming an amount of $171.00 for breach of a contract of carriage of a shipment of certain poultry.

The defendants appearing specially, filed a demurrer, alleging that "the court has no jurisdiction of the persons of the defendants for the reason that the complaint shows a cause of action within the jurisdiction of a justice of the peace and this court, having only concurrent jurisdiction with the justices of the peace, obtains no jurisdiction where summons is served out of the county." Thereafter the defendant entered a special appearance and moved to quash the service of summons upon the ground that none of the defendants lived in Guilford County. The motion and demurrer were overruled, and upon appeal to the Superior Court, the judgment of the municipal court was affirmed and the cause remanded for trial, and defendants appealed.

Reitzel & Waynick for plaintiff.
Murray Allen for defendants.

BROGDEN, J. Has the municipal court of the city of Greensboro jurisdiction to determine a cause upon contract, involving less than $200.00, when the sole defendant is not a resident of Guilford County and summons is served in Lee County?

The "municipal court of the city of Greensboro" was established pursuant to chapter 651 of the Public Laws of 1909. Originally the court had criminal jurisdiction only. Thereafter by chapter 126 of Private Laws of 1931 civil jurisdiction was conferred. Such jurisdiction is bounded as follows: Section 32(a): "Concurrent with justices of the peace in all civil matters, actions and proceedings within the jurisdiction of justices of the peace." (b): "Concurrent jurisdiction with the Superior Court on civil actions, as follows: (1) in actions founded on contract where the sum demanded (exclusive of interest) or the value of the property in controversy does not exceed five hundred dollars," etc.

Justices of the peace have jurisdiction of all civil actions founded on contract except "wherein the sum demanded, exclusive of interest, exceeds $200.00." North Carolina Constitution, Article IV, section 27, C. S., 1473. It is provided by C. S., 1489 that a justice of the peace cannot issue process to a county other than his own "unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of his county," etc. Obviously the munici-

pal court of the city of Greensboro was exercising the jurisdiction of a justice of the peace in the case at bar, but the plaintiff asserts that the foregoing sections of Consolidated Statutes were modified by section 34, chapter 126 of the Private Laws of 1931. The pertinent portion of said section 34 is as follows: *"Provided further,* that no summons shall be issued for any defendant, if an individual, residing outside of, or if a corporation, not having a place of business in Guilford County, unless application for the issuance of the same is made to the judge of said civil division and said judge, upon being satisfied by affidavit or otherwise that a trial in Guilford County will work no injustice to the said defendant, orders said summons to be issued." The plaintiff construes this section of the statute to mean that the municipal court of the city of Greensboro has jurisdiction on contracts up to $500.00 and that upon proper affidavit the said municipal court can issue a summons to any county in the State irrespective of the provision of C. S., 1489 and C. S., 1490. However, said section 34 of said chapter 126 must be read and interpreted in the light of section 54 of said chapter 126. Section 54 expressly retains "all laws relative to civil actions, matters and proceedings in courts of a justice of the peace, including all laws relative to process, rules of practice, procedure, orders, writs, decrees, judgments and appeals, but excluding none of such laws not specifically mentioned, shall be applicable to the civil division of the municipal court in the exercise of its jurisdiction as the same is set forth in this act," etc. C. S. sections 1489 and 1490 are not specifically mentioned in said chapter 126, and, therefore, retain their vitality. Consequently the trial judge should have sustained the demurrer and motion made by the defendant.

Reversed.

MARY G. PAYNE v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 28 June, 1933.)

Negligence A c—Res ipsa loquitur does not apply where all facts causing injury are known and testified to.

Plaintiff's evidence tended to show that she fell while attempting to go down the stairs in her home in the dark after all lights in the house had gone out, and that her fall was caused by her miscalculation of the number of steps to the landing. There was no evidence as to why the lights went out. In her action against the power company it is held a judgment as of nonsuit was properly entered, the doctrine of *res ipsa loquitur* not applying when all the facts causing the accident are known and testified to at the trial.

PAYNE *v.* LIGHT CO.

CIVIL ACTION, before *Alley, J.*, at Spring Term, 1933, of BUNCOMBE.

This suit was instituted for the recovery of damages for personal injury sustained by plaintiff on or about 3 December, 1931. She alleged that "on said date, while standing in her bedroom on the second floor of her house at a point not far from her doorway, with the intention at the moment of going down stairs to her evening meal, the light in plaintiff's bedroom went out; that the plaintiff did not know at this time that the lights were off throughout the entire house, but thought that the electric light bulb in her room had probably burned out; that the plaintiff proceeded to a doorway, thus carrying out her intention of going down stairs, and when she reached her said doorway, which is at the head of the stairway, and was about to begin her descent of the stairs, she then became aware of the fact that all of the lights in her home, including the light which lighted the stairsteps were out; . . . that all of the lights in her home were extinguished and permitted to go out by the negligence of the defendant, Carolina Power and Light Company, as a result of the defendant's violation of its duty in failing and neglecting to keep its wires and other equipment in proper condition and repair, thereby leaving the entire household in complete darkness." Plaintiff further alleged that such negligence was the cause of her fall and injury.

Plaintiff testified: "I had laid my work down and had decided to go down stairs at that time to the evening meal . . . when the lights went out in my room. I did not know the lights were out all over the house. I decided there was some little something wrong with my globe. . . . I had made up my mind to go down, just started on to the door. I am familiar with all the furniture and objects in my bedroom. . . . When I learned that the lights were out which lighted the stairway and the house outside my room, I had gone out of my room to the stairway which is right at the head of my room, right at the door of my room. . . . When I got to the door I saw the lights were off, but I was right at the head of the stairs. I just put my hand on the railing post, and undertook to go down the steps. The way didn't appear dangerous to me, as I felt that I knew the way down. I just put my hands on the railing and went down, but I lacked one step before stepping on the platform or landing. I stepped over that step, thinking I was on the landing, that one step I lacked is what threw me against the wall. . . . I thought I had reached the landing when I lacked that one step being on the landing. . . . The reason I fell was because I thought I was on the bottom when I really was not." The evidence tended to show that the plaintiff received painful injuries, and that she was a customer of defendant by virtue of the fact that the defendant was undertaking to furnish lights to the residence of plaintiff and other citizens of the community.

There is no evidence as to why the lights went out.

The cause was tried in the county court, and was nonsuited. Upon appeal to the Superior Court a judgment of nonsuit was affirmed, and the plaintiff appealed.

R. Hilliard Greenwood for plaintiff.
Harkins, Van Winkle & Walton and Phillips & Arledge for defendant.

BROGDEN, J. As the plaintiff starts down the stairs of her home for supper, the lights go out. She reaches the side of the stairway and immediately becomes aware of the fact that none of the lights in the house are burning. Notwithstanding she undertakes to go down stairs in the dark, misses her step, falls and is injured. She said: "The reason I fell was because I thought I was on the bottom when really I wasn't." The plaintiff relies upon *res ipsa loquitur* to make out a case. This principle has no application "when all the facts causing the accident are known and testified to by the witness at the trial." *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251. Consequently the judgment is correct.

Affirmed.

ETTA BEAVERS v. LILY MILL AND POWER COMPANY ET AL.

(Filed 28 June, 1933.)

1. Master and Servant F b—Injury in this case held not to have resulted from accident arising out of and in course of employment.

Claimant joined other employees on the mill ground at the suggestion of the foreman for the purpose of taking a group picture, and was injured when a seat prepared by the photographer collapsed. The employer had no interest in the picture, which was taken of those voluntarily wishing to appear therein, the photographer alone intending to profit from their sale. *Held,* the injury did not result from an accident arising out of and in the scope of claimant's employment.

2. Same—

In order for an accidental injury to be compensable under the Compensation Act it must arise out of and in the course of the employment, and both elements are essential to an award.

CLARKSON, J., dissenting.

APPEAL by defendants from *Schenck, J.,* at October Term, 1932, of CLEVELAND.

Proceeding under Workmen's Compensation Act to determine liability of defendants for injury to plaintiff.

The plaintiff suffered an injury by accident on 14 July, 1931, while a group picture of the mill employees of the Lily Mill and Power Company was being taken on the mill premises by a private photographer. The employer had no interest in having the picture taken; it was not for use in the business; it included those who voluntarily wished to appear in the group; the photographer alone intended to profit by a sale of the pictures.

The group of employees was composed of the night shift who had congregated on the premises waiting for the day shift to come out of the mill. The facts upon which the Industrial Commission predicated its award are as follows:

"Sometime between five forty-five and six o'clock as the plaintiff was entering the mill of the defendant employer she was told by some one and it appears from the evidence that the person who told her was the foreman in charge, to go out and join some other employees in having their picture made. In compliance with this request the plaintiff joined the other employees and took a seat on a bench prepared by a Shelby photographer for the purpose of accommodating the employees while the picture was being made and it seems that this bench collapsed causing the injury complained of by the plaintiff."

The hearing commissioner stated the case thusly:

"The question presented in this cause is whether or not this accident arose out of and in the course of the employment. This is a rather close case but under all the circumstances the Commissioner is of the opinion that the plaintiff has made out her claim against the defendants."

The findings and conclusion of the hearing commissioner were approved by the full Commission, and, on appeal to the Superior Court, the award was upheld. Defendants appeal.

C. B. McBrayer for plaintiff.
J. Laurence Jones for defendants.

STACY, C. J. The sole question presented by the appeal is whether plaintiff was injured by accident arising out of and in the course of her employment. We think not. *Conrad v. Foundry Co.,* 198 N. C., 723, 153 S. E., 266.

It is true, the accident took place on the mill premises. But it could hardly be said to have arisen "out of and in the course of the employment," both of which are necessary to justify an award under the Workmen's Compensation Act. *Hunt v. State,* 201 N. C., 707, 161 S. E., 203; *Harden v. Furniture Co.,* 199 N. C., 733, 155 S. E., 728. It was not the result of one of the risks incident to the employment. *Cennell v. Daniels*

Co., 203 Mich., 73, 7 A. L. R., 1301. The condition antecedent to compensation is the occurrence of an injury (1) by accident, (2) arising out of and (3) in the course of the employment. *Conrad v. Foundry Co., supra;* 28 R. C. L., 801.

In the light of the facts, which are not in dispute, we are constrained to believe that plaintiff was not injured "by accident arising out of and in the course of the employment." Chap. 120, P. L., 1929, sec. 2(f).

Reversed.

CLARKSON, J., dissenting.

E. B. ATKINSON ET AL. v. THE CITY OF ASHEVILLE ET AL.

(Filed 28 June, 1933.)

Municipal Corporations F c—Evidence of fraud and collusion between officers and vendor held sufficient in action to set aside deed to city.

In this action to set aside and cancel a deed to a city on the ground of fraud and collusion between the officers of the city and the officers and stockholders of the vendor, the evidence is held to permit the inference that the sale was made without warrant of law, that the price paid was grossly excessive, and that certain city officers were financially interested in the transaction to the knowledge of the other defendants, and that the interests of the city were not adequately protected by those defendants charged with that duty, and the evidence is held sufficient to be submitted to the jury.

APPEAL by plaintiff from *Clement, J.,* at August Term, 1932, of BUNCOMBE.

Civil action by plaintiff, who sues on behalf of himself and other taxpayers, (1) to cancel deed from French Broad Cemetery Company to city of Asheville, purporting to convey 181.22 acres of land for cemetery purposes, on the ground of fraud and collusion between certain officers of the city and officers and stockholders of the cemetery company; and (2) for an accounting for funds thus wrongfully obtained from the city of Asheville. For a fuller statement of the case, see report on former appeal, *Atkinson v. Greene,* 197 N. C., 118, 147 S. E., 811.

In the present suit, the city of Asheville has joined with the plaintiff in the prosecution of the action.

At the close of plaintiff's evidence, there was a judgment of nonsuit, from which plaintiff appeals, assigning errors.

J. G. Merrimon, Marcus Erwin and Alfred S. Barnard for plaintiff.

Robert M. Wells, A. Hall Johnston and Carter & Carter for defendants, other than the city of Asheville.

STACY, C. J. There is allegation to the effect, and the evidence permits the inference, though it may not compel the conclusion, that the sale in question was without adequate warrant of law; that the price paid was grossly excessive; that at least two of the city officials, to the knowledge of the other defendants, were financially interested in the transaction; and that the interests of the city of Asheville were not properly cared for by those of the defendants charged with such duty.

This evidence, it would seem, is sufficient to carry the case to the jury under the principles announced in *Brown v. R. R.*, 188 N. C., 52, 123 S. E., 633, *S. v. Williams,* 153 N. C., 595, 68 S. E., 900, and differentiates it from *Harrison v. New Bern,* 193 N. C., 555, 137 S. E., 582, cited and relied upon by defendants.

We refrain from a discussion of the evidence, as its credibility is for the jury.

Reversed.

CARRIE L. STEWART, ADMINISTRATRIX, v. PHŒBE DOAR ET AL.

(Filed 28 June, 1933.)

Executors and Administrators D e—Docketed judgment comes within fifth class enumerated by statute prescribing priority.

A docketed judgment against the lands of a deceased comes within the fifth class enumerated by the statute prescribing priority, C. S., 93, and, unless made so by its terms, is not such a "specific lien on property" as to bring it within the first class enumerated by the statute.

APPEAL by defendants from *Warlick, J.,* at February Term, 1933, of ROWAN.

Proceeding to sell land to make assets, and to determine priority of application.

The defendants were judgment creditors of plaintiff's intestate at the time of his death. He died seized and possessed of a tract of land in Rowan County, which has been sold to make assets. The personal estate of decedent is insufficient to pay his debts.

The following question was submitted to the court for decision on an agreed statement of facts: "Do the judgments of the defendant against the lands of the deceased, taken during his lifetime, have precedence and priority over a claim for funeral expenses for the burial of the deceased?"

The court held "that the judgments of the defendants, although duly docketed on real estate several years preceding the death of the judgment debtor, do not have precedence and priority over a claim for funeral expenses; it is, therefore, ordered and adjudged, that the pro-

ceeds from the sale of said lands shall first be applied to the payment of funeral expenses before any part shall be applied on the judgments of the defendants."

From this ruling, the defendants appeal, assigning error.

No counsel appearing for plaintiff.
R. Lee Wright for defendants.

STACY, C. J. The question propounded is answered by the statute. It is provided by C. S., 93 that the debts of a decedent shall be paid in classes, funeral expenses constituting the second class, and docketed judgments, to the extent of the lien (*Jerkins v. Carter,* 70 N. C., 500), the fifth. The lien of a docketed judgment, which is *eo nomine* put in the fifth class, is not such a "specific lien on property," unless made so by its terms, as to come within the first class mentioned in the statute.

Upon the record as presented, the judgment is correct. *Murchison v. Williams,* 71 N. C., 135.

Affirmed.

NELL GLENN SCOTT v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 28 June, 1933.)

1. **Pleadings D e—Complaint will be liberally construed upon demurrer.**

Upon a demurrer for failure of the complaint to state a cause of action the pleading will be liberally construed in favor of plaintiff, and the demurrer will be overruled if the complaint in any portion or to any extent presents facts sufficient to constitute a cause of action.

2. **Insurance P a—Complaint alleging liability in general terms of policy and specific facts not inconsistent therewith held not demurrable.**

Where the complaint in an action on a policy of insurance alleges liability in the general terms of the policy, and later alleges specific facts upon which recovery is sought, the general allegations will not be limited by the specific allegations if the specific allegations are not inconsistent therewith, and plaintiff being entitled to recover if the general allegations are supported by evidence at the trial, a demurrer to the complaint for failure to state a cause of action should be overruled.

APPEAL by plaintiff from *Stack, J.,* at February Term, 1933, of GUILFORD. Reversed.

This is an action to recover of the defendant the sum of $2,000, by reason of the provisions of riders attached to and forming a part of two policies of insurance issued by the defendant insuring the life of Robert B. Scott. The plaintiff is the beneficiary named in each of said policies. Both policies were issued on 26 April, 1921, and were in full

force at the date of the death of the insured, to wit: 2 May, 1931. The defendant has paid to the plaintiff the face amount of each policy, to wit: $1,000.

The rider attached to and forming a part of each policy is in words as follows:

"If the death of the insured occurs before the first anniversary date of this policy which follows the age of seventy years, and before a payment under the permanent disability provision, if any, has been made or benefit thereunder allowed, all premiums previously due having been paid, and such death result directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means within ninety days from the occurrence of such accident and if such accident is evidenced by a visible contusion or wound on the exterior of the body (except in case of drowning and internal injuries revealed by an autopsy), and if such death does not result from suicide, while sane or insane, nor from military or naval service in time of war, nor from an aeronautic flight or submarine descent, nor directly or indirectly from disease in any form, then the company will pay a sum equal to the sum herein described as the sum insured in addition thereto."

This action was begun on 19 November, 1931. The complaint contains allegations as follows:

"4. That the said Robert B. Scott died on the said 2 May, 1931; that thereafter proofs of death were made out and furnished to the defendant by W. A. Scott, father of the insured, without the knowledge on the part of the plaintiff that said policies contained any double indemnity provisions; that thereafter the plaintiff furnished defendant further proofs tending to show that the death of said insured was caused solely through external, violent and accidental means within the provisions of the riders on said policies; that thereafter the defendant paid to the plaintiff the face amount of each of the said policies, to wit: $1,000, each, and that same was paid by defendant and accepted by plaintiff without prejudice to any claim or cause of action she might have on account of said double indemnity provision.

5. That the death of said Robert B. Scott resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means within ninety days from the occurrence of such accident; that the said accident was evidenced by visible contusion or wound, and did not result directly or indirectly from any of the causes or exceptions mentioned in said rider.

6. That the death of said insured was caused and resulted in substantially the following manner: the insured on 25 April, 1931, had a tooth extracted by a duly and regularly licensed and practicing dentist

in the city of Greensboro, which extraction left a visible contusion or wound on the body of the deceased; that either at the time of the extraction of said tooth or soon thereafter streptococci germs, a violent and deadly class of bacterial germs, were accidentally introduced, or found a port of entry, from the exterior of insured's body in and to the insured's blood stream; that about two days thereafter defendant's throat and neck and the glands thereof, became badly swollen so that it was necessary for insured to go to a hospital and undergo an operation upon his throat, that as a result either of said operation or of said infection, the insured died on 2 May, 1931.

7. That immediately prior to the extraction of said tooth the insured was a strong, well and able-bodied man, and was suffering from no disease or complaint whatsoever, except that the tooth that was to be extracted was aching; that within less than a week after said tooth was extracted, the insured was dead; that his said death was caused solely, directly, immediately and independent of all other causes by the said accidental infection, from the outside, and by means of said violent infection, which poisoned his entire system, and necessitated said operation, and his said death was due solely and immediately, and independent of all other causes to said infection, and/or the operation thereby necessitated.

8. That by reason of the matters and things aforesaid, the defendant is indebted to the plaintiff in the sum of $2,000, with interest thereon from 5 August, 1931, until paid at the rate of six per centum per annum; that demand therefor has been made by the plaintiff upon the defendant, but no part of same has been paid, and the whole remains justly due and owing and is subject to no counterclaim, credit or set off whatsoever."

The defendant filed an answer to the complaint, in which it denied all the material allegations therein. However, when the action was called for trial, the defendant, notwithstanding its answer, demurred *ore tenus* to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action. This demurrer was sustained, and the plaintiff excepted.

From judgment dismissing the action, the plaintiff appealed to the Supreme Court.

Hines & Boren for plaintiff.
Sapp & Sapp for defendant.

CONNOR, J. In *Hoke v. Glenn,* 167 N. C., 594, 83 S. E., 807, it is said: "It is the purpose of the Code system of pleading, which prevails with us, to have actions tried upon their merits, and to that end pleadings are construed liberally, every intendment is adopted in behalf

of the pleader, and a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient."

This principle has been uniformly applied by this Court, which does not look with favor upon a demurrer to a complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action in which the plaintiff is not entitled to relief. It is rarely the case that a complaint is so defective in its allegations that a demurrer on that ground, can be or should be sustained. *McNeill v. Thomas,* 203 N. C., 219, 165 S. E., 712, *Staley v. Park,* 202 N. C., 155, 162 S. E., 202, *Joyner v. Woodard,* 201 N. C., 315, 160 S. E., 288, *Smithwick v. Pine Co.,* 199 N. C., 431, 154 S. E., 917, *Smith v. Suitt,* 199 N. C., 5, 153 S. E., 602, *Bechtel v. Bohannon,* 198 N. C., 730, 153 S. E., 316, *Cole v. Wagner,* 197 N. C., 692, 150 S. E., 339, *Meyer v. Fenner,* 196 N. C., 476, 146 S. E., 82, *Seawell v. Cole,* 194 N. C., 546, 140 S. E., 85, *S. v. Trust Co.,* 192 N. C., 246, 134 S. E., 656, *Hartsfield v. Bryan,* 177 N. C., 166, 98 S. E., 379.

Applying this principle to the facts alleged in the complaint in the instant case, we are of opinion that there is error in the judgment sustaining the demurrer and dismissing the action. For that reason the judgment must be reversed, to the end that the action may be tried on the issues raised by the answer to the complaint appearing in the record.

The facts with respect to the cause of the death of the insured as alleged generally in the complaint are sufficient to state a cause of action on the rider attached to and forming a part of each of the policies of insurance issued by the defendant, in which the plaintiff is named as beneficiary. It is alleged in paragraph 5 of the complaint that the death of the insured resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means, within ninety days from the occurrence of such accident, and that said accident was evidenced by visible contusion or wound, and did not result directly or indirectly from any other causes or exceptions mentioned in the rider. On these facts the defendant, by the express language of the rider attached to and forming a part of each policy is liable to the plaintiff for the sum of $1,000, in addition to the face amount of said policy. These general allegations

are sufficient to constitute a cause of action and if they are sustained by the evidence at the trial, the plaintiff will be entitled to judgment as prayed for in her complaint.

Doubtless in anticipation of a motion by the defendant that her general allegations be made specific, the plaintiff alleges in paragraph 6 of her complaint that the death of the insured resulted from an accidental infection of his blood stream, following the extraction of a tooth by a dentist, or from an operation made necessary by such infection. These specific allegations are not inconsistent with or contradictory of the general allegations of paragraph 5 of the complaint, and are therefore not determinative of the question presented by defendant's demurrer.

In *Horton v. Travellers Ins. Co.* (Cal.), 187 Pac., 1070, which was an action upon a policy of insurance containing a provision similar to that contained in the rider on which this action was brought, it is said:

"As against a general demurrer, a complaint is sufficient when adopting the language of the policy, it avers in general terms that the insured met his death from bodily injuries effected directly through external, violent and accidental means, and that his death was occasioned by such means alone, without averring the particular facts and circumstances attending the death or injury, as plaintiff has done in this case. *Richards v. Travellers Ins. Co.*, 89 Cal., 170, 26 Pac., 762, 23 Am. St. Rep., 455; 1 C. J., 489. It is, it is true, the general rule that specific averments must be given preference over general averments, inasmuch as the general allegations are deemed explained, limited and controlled by the specific allegations; but this is true only where there is an inconsistency between the general and specific averments. In the absence of any inconsistency, the general averments, if necessary, may be looked to, to complete the essentials of a cause of action. If, in the instant case, the general allegations alone be looked to, the complaint unquestionably alleges a cause of action, and we think the specific averments are entirely consistent with the general averments and with the statement of a cause of action."

We cannot anticipate what the evidence at the trial of this action on the issues raised by the answer to the complaint will be. For this reason, we shall not at this time undertake to review or to discuss the cases from other jurisdictions cited in the briefs filed in this appeal. We are of opinion that the general allegations of the complaint are sufficient to state a cause of action and that the specific allegations are not inconsistent with or contradictory of the general allegations. For this reason the judgment dismissing the action must be

Reversed.

C. R. BOLICH v. THE PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY.

(Filed 28 June, 1933.)

1. **Insurance P b—Where evidence is sufficient to sustain liability under any provisions of policy nonsuit is properly refused.**

Evidence that insured was injured by being struck in the face by a stream of hot water suddenly emitted from the radiator of an automobile after a violent combustion in the automobile when a mechanic stepped on the starter, and that insured was thereby disabled from work for a period of time and gave notice of the accident as soon as reasonably possible, *is held*, sufficient to overrule insurer's motion as of nonsuit on a policy providing for liability if insured lost time from work as a result of injury incurred solely by the happening of a purely accidental event resulting from the explosion of an automobile, and gave notice thereof within a specified time or as soon as reasonably possible.

2. **Same—Trial court's definition of term "explosion" held not erroneous.**

In determining liability under a policy providing for the payment of a certain sum for injury caused by the explosion of an automobile, the word "explosion" will be construed in its popular and not its scientific sense, and the trial court's definition of the term upon evidence tending to show that insured was injured by a stream of hot water suddenly emitted from the radiator of an automobile after a terrible combustion in the motor when a mechanic stepped on the starter *is held* not erroneous.

3. **Same—Where policy unambiguously defines loss of sight as irrecoverable loss of entire sight the term may not be enlarged by construction.**

Where the unambiguous language of a policy of accident insurance defines loss of sight as the irrecoverable loss of the entire sight, it is error for the trial court to enlarge the construction of the term in his charge to the jury as the entire loss of sight for practical purposes.

APPEAL by defendant from *Oglesby, J.*, at October Term, 1932, of STANLY. New trial.

This is an action on a policy of insurance by which the defendant, in consideration of an annual premium of ten dollars, insured the plaintiff, in the principal sum of $5,000, "against loss of life, limb, limbs, sight or time, resulting without other contributing cause from bodily injury which is effected solely by the happening of a purely accidental event and which is sustained by the insured during the life of the policy, and only as the result of (a) driving, demonstrating, or riding in an automobile; (b) being struck, run down or run over by a moving automobile; (c) the burning or explosion of an automobile; (d) suffocation caused solely by carbon monoxide gas from the exhaust of an automobile; (e) cranking an automobile; all in the manner and to the extent hereinafter provided."

It is provided in the policy that for the loss of an eye resulting from a bodily injury covered by the policy, the defendant will pay to the plaintiff one-third of the principal sum, and that the loss of an eye shall mean the irrecoverable loss of the entire sight thereof.

It is further provided in the policy that if the plaintiff shall sustain an injury covered by the policy, but not resulting in any specific loss mentioned therein, the defendant will pay to the plaintiff certain sums as indemnity for his loss of time, and for medical and hospital expenses, dependent upon whether plaintiff shall be wholly or only partially disabled during such time as the result of the injury.

It is further provided in the policy that written notice of an injury on which a claim may be based must be given by the plaintiff to the defendant, or its authorized agent within twenty days after the date of the accident causing such injury. Failure to give notice within the time provided in the policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice, and that notice was given as soon as was reasonably possible.

The action was begun on 30 April, 1931. It was admitted at the trial that the policy sued on was in full force at the date of the accident which resulted in the bodily injury sustained by the plaintiff, as alleged in the complaint. At said date plaintiff was the manager of the Stanly Auto Company. With respect to the accident and his resulting injury, the plaintiff testified as follows:

"About four o'clock in the evening of 1 May, 1929, Mr. Ed. Snuggs, who had purchased from the Stanly Auto Company, a Model A Ford, drove into the garage and said to me that his car seemed to be heating, and asked me to drive with him for a demonstration. We drove up the Salisbury road about six miles, and on our return drove into the garage. I stepped out of the car and called a mechanic, and requested him to examine the car to discover what was wrong with it. He filled the radiator with water, and got into the car. He stepped on the starter, and the exhaust of the motor blew up. It threw water to the ceiling. I was standing in front of the car, but was not looking into the radiator. The water was hot, and struck me in the face. When the mechanic stepped on the starter, there was a terrible combustion in the motor. I was blinded by the hot water which struck me in the face.

"I was taken first to the Yadkin Hospital, where I remained about two weeks. I was then taken to Charlotte, where my eye was treated by specialists. For seven weeks, I was absolutely blind in my right eye. For all practical purposes I do not consider my right eye worth anything to me now. I cannot see to read with my right eye; I cannot

see to figure or write with it. From the point of vision, I do not think my right eye is any better since I left the hospital. I can see large objects close to me, but I cannot look at any ordinary object through my right eye for any length of time. The object will blur, but by continually batting my eyes, I can see the object. I cannot hold my sight. I have never had my right eye fitted with glasses so that I can see. I have tried several oculists. The sight of my right eye is not entirely gone.

"After the accident I communicated with the defendant about 4 June, 1929. I gave the last notice of my claim under the policy on 2 October, 1929. I was compelled to wait until the doctors relieved me of my injury. I gave the notice as soon as I could."

There was evidence tending to corroborate the testimony of the plaintiff, both as to the accident and as to his injury. All the evidence tended to show that the injury to plaintiff's eye is permanent, but that he has not sustained a loss of the entire sight of his right eye. Because of his injury, plaintiff was unable to do any work for about three and one-half months. Since his return to his work, he has not been able to perform all his usual duties as manager of the Stanly Auto Company.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff injured by the explosion of an automobile as provided in the policy of insurance? Answer: Yes.

2. If so, did said explosion and injury cause the irrecoverable loss of the sight of plaintiff's right eye within thirty days after said accident, as provided in the policy and as alleged in the complaint? Answer: Yes.

3. How long was plaintiff totally disabled, if he was disabled, on account of the explosion of an automobile and the injury occasioned thereby as alleged in the complaint? Answer: .....

4. How long was the plaintiff partially disabled, if he was disabled at all, on account of the explosion of an automobile and the injury occasioned thereby as alleged in the complaint? Answer: .....

5. Did the plaintiff comply with the requirements of the policy of insurance regarding the giving of notice and the furnishing of affirmative proof of loss? Answer: Yes."

Under the instructions of the court, the jury having answered the first and second issues, "Yes," did not answer the third or the fourth issue.

From judgment that plaintiff recover of the defendant the sum of $1,666.66, with interest and costs, the defendant appealed to the Supreme Court.

Morton & Smith for plaintiff.
R. L. Smith & Sons for defendant.

CONNOR, J. There was evidence at the trial of this action tending to show that plaintiff sustained a bodily injury which was effected solely by the happening of a purely accidental event resulting from the explosion of an automobile, and that plaintiff gave notice to the defendant of his claim under the policy of insurance sued on as soon as was reasonably possible. For this reason there was no error in the refusal of the court to allow the motion of the defendant, at the close of all the evidence, that the action be dismissed by judgment as of nonsuit. The accident did not happen until the mechanic stepped on the starter. There was then a terrible combustion in the motor, followed by the sudden emission of water from the radiator, which struck the plaintiff in the face, about the eyes, and caused his bodily injury. This injury resulted in loss to the plaintiff, for which the defendant by the express language of its policy agreed to indemnify the plaintiff.

With respect to the first issue submitted to the jury, the court charged as follows:

"The court further instructs you that if you find by the greater weight of the evidence that the gasoline sent to the cylinder of the car for the purpose of exploding and causing the pistons to go up and down as the case may have been in the regular operation of the car, exploded and instead of causing the pistons to perform their natural and proper functions which were necessary and sufficient to run the motor of the automobile in question, but started an explosion by force, causing the liberation of warm or hot water from its environment, that would constitute an explosion of the automobile, and if the plaintiff was injured as a direct result of such an explosion, and has so satisfied you by the greater weight of the evidence, you would answer the first issue, 'Yes.' If the plaintiff has failed to do so, you would answer the first issue 'No.' "

The defendant's exception to this instruction cannot be sustained. The word "explosion" is variously used, and is not one that admits of exact definition, having no fixed or definite meaning, either in ordinary speech or in the law. 25 C. J., 178. It implies, however, a sudden expansion of a liquid substance, with the result that the gas generated by the expansion escapes with violence, usually causing a loud noise. The word as used in a policy of insurance should be construed in its popular sense, as used by ordinary men, and not in a scientific sense as used by scientific men. There was evidence at the trial of this action which tended to show that the hot water which struck the plaintiff in

the face, and injured his eyes, was forced out of the radiator by an explosion in the automobile.

With respect to the second issue, the court charged the jury as follows:

"The court instructs you that the loss of an eye within the meaning of the policy of insurance means the entire loss for the practical use thereof, and the court instructs you that if the entire sight of the eye is not completely destroyed but that what sight is left is of no practical use or benefit and that this condition will continue throughout the life of the plaintiff, then the plaintiff within the meaning of said policy has sustained the loss of an eye. 'Practical,' gentlemen, as used in this definition means 'capable of being used,' that is usable and valuable in practice, capable of being turned to use by the plaintiff.

"If the plaintiff has satisfied you by the greater weight or the preponderance of the evidence that said explosion and injury caused the irrecoverable loss of the sight of plaintiff's right eye as defined to you by the court, within thirty days after said accident, you would answer the second issue, 'Yes.' If the plaintiff has failed to so satisfy you and you find that there is a practical use, if his eye is capable of being turned to practical use, you would answer the second issue, 'No.' "

The defendant's exception to this instruction must be sustained. The liability of the defendant under the policy sued on is expressly limited by language which is free from uncertainty and ambiguity. This liability cannot be enlarged by construction. It is expressly provided in the policy which the plaintiff accepted and on which he brings this action, that the loss of an eye, for which the defendant shall be liable under the policy, means the irrecoverable loss of the entire sight thereof. It was error for the court to enlarge this liability by its instruction that the loss of an eye means the entire loss for practical purposes. There was no evidence tending to show that the bodily injuries sustained by the plaintiff resulted in the loss of an eye which resulted in the irrecoverable loss of the entire sight thereof. For this error the defendant is entitled to a new trial, of the second, third and fourth issues.

Although the defendant may not be liable to the plaintiff under the policy for the loss of an eye, there was evidence tending to show that the defendant is liable to the plaintiff under the policy for the loss of time, and for medical and hospital expenses. If on the new trial, the jury shall answer the second issue "No," this evidence should be submitted to the jury under proper instruction.

New trial.

ALEXANDER CROSSETT, GEORGE T. DUNLAP, AND O. H. STUTTS, v. JOHN R. McQUEEN, W. D. SMITH, CITIZENS BANK AND TRUST COMPANY, ATLANTIC JOINT STOCK LAND BANK AND OTHERS.

(Filed 28 June, 1933.)

Execution B c—Interests of cestui que trust held not subject to judgments against trustee holding title under unregistered trust agreement.

Plaintiffs alleged that they were purchasers of certain land with one of defendants, that deed was made to him and that he took possession of the land as trustee for himself and plaintiffs as tenants in common under a contemporaneous agreement between the parties, each having paid one-fourth the purchase price, that the trust agreement was in writing but was not registered until after the docketing of the other defendants' judgments against the grantee defendant, that the deed to the grantee defendant failed to describe him as "trustee" through the mutual mistake of the parties or the draftsman, that the grantee defendant executed a registered mortgage on his one-fourth undivided interest and that the mortgage was foreclosed and his interest purchased at the sale by plaintiffs. *Held,* the trust agreement was not a conveyance of or a contract to convey land, C. S., 3309, and did not require registration as against creditors, and upon demurrer of defendant grantee's judgment creditors, plaintiffs were entitled to reformation of the deed, and the judgment creditors whose judgments were docketed prior to the execution of the mortgage were entitled to a lien only upon defendant grantee's one-fourth interest in the land, and the judgment creditors whose judgments were docketed subsequent to the execution of the mortgage were not entitled to any lien upon the land.

APPEAL by the defendants, Citizens Bank and Trust Company and Atlantic Joint Stock Land Bank, from *Oglesby, J.,* at September Term, 1932, of MOORE. Affirmed.

The defendants, Citizens Bank and Trust Company, and Atlantic Joint Stock Land Bank, demurred to the complaint in this action, on the ground that the facts stated therein are not sufficient to constitute a cause of action against said defendants.

The demurrers were overruled, and the demurring defendants appealed to the Supreme Court.

Johnson & Johnson for the plaintiffs.
U. L. Spence for the defendant, Citizens Bank and Trust Company.
McLean & Stacy for the defendant, Atlantic Joint Stock Land Bank.

CONNOR, J. The facts alleged in the complaint and admitted by the demurrers may be summarized as follows:

During the month of April, 1924, the plaintiffs, Alexander Crossett, George T. Dunlap, and O. H. Stutts, and the defendant, John R. Mc-

Queen, entered into an agreement, each with the others, that they would purchase a tract of land situate in Moore and Hoke counties, North Carolina, containing 1,664 acres, and known as the Daniel Hector McNeill Home Place. It was agreed that each would contribute one-fourth of the purchase price for said tract of land, and that each should become the owner of an undivided one-fourth interest therein. It was further agreed that said tract of land should be conveyed to the defendant, John R. McQueen, as trustee for the plaintiffs and himself, and that contemporaneously with such conveyance the said John R. McQueen should execute in quadruplicate a paper-writing declaring therein that he held the legal title to said tract of land in trust for the plaintiffs and himself. It was further agreed that after the conveyance of said tract of land to him, the defendant, John R. McQueen, should enter into possession of the same as trustee for the plaintiffs and himself, and should control and manage the said tract of land as such trustee.

Pursuant to said agreement, the defendant, John R. McQueen, procured the execution by the defendant, W. D. Smith, who had purchased the said tract of land at a sale made by the trustee in bankruptcy of Daniel Hector McNeill, of a deed dated 29 April, 1924, and conveying the said tract of land to him. The purchase price for said tract of land, to wit: $34,944, was paid by the plaintiffs and the defendant, John R. McQueen, each paying one-fourth of said sum, to wit: $8,736, in accordance with their agreement. The deed from W. D. Smith to John R. McQueen was duly registered in Moore County on 19 May, 1924. It was not registered in Hoke County until some time after June, 1932. Contemporaneously with the execution and delivery of said deed to him, the defendant, John R. McQueen, executed in quadruplicate a paper-writing declaring therein that he held the legal title to said tract of land in trust for the plaintiffs and himself, and that he would convey the same at any time as directed by any three of the beneficial owners. This paper-writing was not registered in either Moore or Hoke counties until some time after June, 1932. After the execution of the deed by the defendant, W. D. Smith, to him, the defendant, John R. McQueen, entered into possession of the said tract of land, and controlled and managed the same as trustee for the plaintiffs and himself, in accordance with the agreement between the plaintiffs and himself.

On 16 June, 1928, the defendant, John R. McQueen and his wife, conveyed all his right, title and interest in and to the said tract of land by a mortgage deed to Crossett and Dunlap, Incorporated, to secure his note payable to said corporation for $7,500. It is recited in said mortgage deed that the interest in said tract of land conveyed thereby is an undivided one-fourth interest. This mortgage deed was duly registered in both Moore and Hoke counties on or about 24 July, 1928. The de-

fendant, John R. McQueen, failed to pay his note secured by said mortgage deed at its maturity, and the mortgage was duly foreclosed. The plaintiffs, Alexander Crossett and George T. Dunlap, are now the owners of the undivided one-fourth interest in said tract of land which was owned by the defendant, John R. McQueen, at the date of his mortgage to Crossett and Dunlap, Incorporated.

Some time during the month of June, 1932, the plaintiffs learned for the first time that the deed from the defendant, W. D. Smith, to the defendant, John R. McQueen, dated 29 April, 1924, and registered in Moore County on 19 May, 1924, purports on its face to convey the tract of land described therein to John R. McQueen, individually, and not as trustee. The omission of the word "trustee," after the name of the grantee in said deed was due solely to the mutual mistake, oversight and inadvertence of the parties to said deed, or to the mistake, oversight and inadvertence of the draftsman. Both the defendants, W. D. Smith, the grantor and John R. McQueen, the grantee, in said deed, have admitted in writing the said mistake, oversight and inadvertence, and have executed a new deed for the purpose of correcting the deed dated 29 April, 1924. This deed, together with the paper-writing executed by the defendant, John R. McQueen, contemporaneously with the deed dated 29 April, 1924, has been duly registered in both Moore and Hoke counties since June, 1932.

After the execution and registration in Moore County of the deed from the defendant, W. D. Smith, to the defendant, John R. McQueen, and prior to the registration of the paper-writing containing the declaration of trust, executed by the defendant, John R. McQueen, certain creditors of said defendant obtained judgments against him, which they caused to be docketed in the office of the clerk of the Superior Court of Moore County. A judgment against said defendant and in favor of the defendant, Citizens Bank and Trust Company, for the sum of $5,310, with interest and costs, was docketed on 13 February, 1928. A judgment against said defendant and in favor of the defendant, Atlantic Joint Stock Land Bank, for the sum of $3,660.98, with interest and costs, was docketed subsequent to 16 June, 1928. Judgments against said defendant and in favor of other defendants for various sums were docketed subsequent to 16 June, 1928. Each of these defendants, judgment creditors of the defendant, John R. McQueen, contends that his judgment is a lien on all the land described in the deed from W. D. Smith to said defendant situate in Moore County, for the reason that said judgment was docketed subsequent to the execution and registration of said deed and prior to the registration of the paper-writing containing the declaration of trust.

The facts as above stated are sufficient to constitute a cause of action on which the plaintiffs are entitled to judgment against the demurring defendant, (1) that the deed from the defendant, W. D. Smith, to the defendant, John R. McQueen, be reformed so that said deed shall on its face convey the tract of land described therein to the defendant, John R. McQueen, as trustee for the plaintiffs and himself, in accordance with their agreement entered into prior to the execution of said deed; (2) that the plaintiffs are now the owners of the said tract of land, as alleged in the complaint; (3) that the defendant, Citizens Bank and Trust Company, has a lien on an undivided one-fourth interest in said tract of land for the amount of its judgment against the defendant, John R. McQueen, said judgment having been docketed prior to the date of the registration of the mortgage deed from John R. McQueen to Crossett and Dunlap, Incorporated; and (4) that the defendant, Atlantic Joint Stock Land Bank has no lien on any part of or interest in said tract of land by reason of its docketed judgment.

The judgment overruling the demurrers of the appellants is affirmed on the authority of *Spence v. Pottery Co.*, 185 N. C., 218, 117 S. E., 32. The instant case cannot be distinguished from that case, except that in the instant case the declaration of trust is evidenced by writing, while in that case the trust vested in parol. The declaration of trust is not a conveyance, or contract to convey, or lease of land, requiring registration as against creditors, by virtue of the provisions of C. S., 3309. The fact that it was not registered prior to the docketing of the judgments is immaterial. The judgment is

Affirmed.

J. H. TATE, ADMINISTRATOR OF THE ESTATE OF LOUIS CHIAPETTA, DECEASED, v. SOUTHERN RAILWAY COMPANY AND W. A. BANKS.

(Filed 28 June, 1933.)

1. Removal of Causes C b—

Upon a motion to remove a cause to the Federal Court on the grounds of separable controversy the allegations of the complaint are controlling and the cause is not removable if joint liability is alleged.

2. Same—Upon petition for removal for fraudulent joinder the allegations of the petition are taken as true.

Upon a petition to remove a cause to the Federal Court on the grounds of fraudulent joinder the jurisdiction of the State Court ends upon the filing of a proper bond and verified petition setting forth facts sufficient to require removal under the law, the State Court having the right to

pass upon the sufficiency of the bond and the petition, but the allegations of the petition are taken as true, the plaintiff having a right to traverse the jurisdictional facts in the Federal Court upon motion to remand.

3. Master and Servant A b—Whether act of railroad policeman is done as employee or officer of law depends upon the nature of the act.

A railroad policeman appointed pursuant to C. S., 3484 is prima facie a public officer, but the question of whether a particular act is done as an employee of the railroad company or as a public officer is a question to be determined from the nature of the act, whether it relates to vindication and enforcement of public justice or whether it is in the scope of duties owed the company by reason of the employment.

4. Removal of Causes C b—Petition held to sufficiently allege fraudulent joinder of railroad policeman in action for wrongful death.

Plaintiff brought action against a railroad policeman and the railroad at whose instance he was appointed to recover for the wrongful death of plaintiff's intestate. The complaint alleged that the resident defendant, while acting within the scope of his duties to the railroad company, maliciously shot and killed plaintiff's intestate when plaintiff's intestate was discovered in a box car where he was riding as a licensee. The railroad company filed petition for removal for fraudulent joinder, alleging that the resident defendant was acting as a public officer and not an employee at the time of the shooting. *Held*, the petition for removal contained more than a denial of the allegation of the complaint, and specifically alleged facts constituting fraudulent joinder, and the petition should have been allowed, the allegations of the petition being taken as true.

APPEAL by Southern Railway Company from *McElroy, J.*, at January Term, 1933, of MCDOWELL. Reversed.

The plaintiff brought suit to recover damages for the wrongful death of his intestate, basing his action substantially upon the following allegations. On 17 June, 1932, the deceased and others were riding in box cars of the Southern Railway Company with the knowledge and assistance of the employees of the company, en route from Washington to their respective homes in Arkansas and Texas. In the early evening, when the train was some miles east of Marion, the deceased and his companions lay down in the box car to sleep and about 10 p.m. were awakened by being kicked and cursed by the defendant Banks, who ordered them to leave the car. Some prepared to get out but the deceased apparently did not at first hear the order. Banks then fired a pistol at the intestate and inflicted a wound which caused his death. The assault was without cause or provocation and was made after the occupants had signified their willingness to obey the order and leave the car. Banks was employed by the Southern Railway Company as a railroad policeman and on the occasion referred to was the agent, servant, and employee of the company acting within the scope of his duties and employment, having authority to eject from trains of the

company persons riding thereon without paying proper fare. It is alleged, also, that the acts of the defendant Banks were gross, wanton, and malicious, and that the plaintiff is entitled to both compensation and punitive damages.

The Southern Railway Company made a motion, based upon its petition and bond, for removal of the cause to the United States District Court, alleging the fraudulent joinder of Banks as a party defendant.

The petitioner admits, as the complaint alleges, that Banks was a railroad policeman, but denies that he was a servant, agent, or employee of the company or engaged in the performance of any of its duties, and alleges that he was not in its service but was a public officer, having been appointed by the Governor under the provisions of C. S., 3484 and 3485. It is further alleged that pursuant to his appointment he gave bond and took an oath to discharge the duties imposed upon him in this respect.

The clerk denied the motion to remove the cause and on appeal to the Superior Court his judgment was affirmed. The petitioner excepted and appealed.

R. C. Kelly, Winborne & Proctor, S. J. Ervin and S. J. Ervin, Jr., for appellant.

J. W. Pless and J. Will Pless, Jr., for appellee.

ADAMS, J. The appeal is prosecuted from an order of the Superior Court denying the petition of the Southern Railway Company for a removal of the cause to the District Court of the United States for the Western District of North Carolina.

When a motion to remove a cause is made on the ground of a separable controversy, the plaintiff may have the question heard and determined upon the allegations in his complaint and the requisite separability does not exist if according to such allegations the defendants are jointly liable. *R. R. v. Thompson,* 200 U. S., 206, 50 L. Ed., 441; *R. R. v. Miller,* 217 U. S., 209, 54 L. Ed., 732; *Swain v. Cooperage Co.,* 189 N. C., 528; *Crisp v. Fibre Co.,* 193 N. C., 77.

It is not contended, however, that the motion should be allowed for this cause. The petitioner is a public carrier incorporated in Virginia and domesticated in North Carolina; Banks is a resident of Buncombe County in this State. The petition is founded on the alleged fraudulent joinder of the individual with the corporate defendant and the merits must be determined by the application of another principle.

Without reviewing the numerous authorities on the subject we need only repeat the familiar rule that the jurisdiction of the State court comes to an end when in apt time the petitioner files a proper bond and

a verified petition setting forth facts sufficient to require a removal under the law. The State court may pass upon the sufficiency of the bond and the petition, but the petitioner's allegations of fact are deemed to be true and if the plaintiff wishes to do so he may traverse the jurisdictional facts in the Federal Court on a motion to remand. *Rea v. Mirror Co.,* 158 N. C., 28; *Lloyd v. R. R.,* 162 N. C., 485; *Smith v. Quarries Co.,* 164 N. C., 338; *Crisp v. Fibre Co., supra; C. & O. R. R. v. Cockrell,* 232 U. S., 146, 58 L. Ed., 544. The rule applies only to such issues of fact as control and determine the right of removal and the petition must contain a full and direct statement of facts adequate, if true, to establish the fraudulent purpose. *Lloyd v. R. R., supra.*

In these respects the petition is sufficient. It sets forth the facts relating to jurisdiction, to the allegations in the complaint, to the circumstances under which the assault was committed, and proceeds with elaborate averments in substance as follows: The controversy, with every issue of law and fact therein, is between the plaintiff, a resident of this State, and the petitioner, a nonresident; the defendant Banks is an improper party; previously to the homicide he had been appointed by the Governor of North Carolina as a railroad policeman, had given bond, had taken the prescribed oath, and at the time of the assault was acting exclusively in his official capacity and not by virtue of any alleged employment by the petitioner, or as its agent, servant, or employee. This, in effect, is the purport of the petition. It is more than a mere denial of the complaint, which would be insufficient (*Lloyd v. R. R., supra*); it was designed to be a specific averment that Banks was acting as an officer of the law.

He was appointed as policeman pursuant to C. S., 3884 *et seq.* Whether at the time referred to he was acting only in an official capacity is not a legal conclusion essentially dependent upon a construction of these statutes. There are numerous decisions of different courts on the question of the liability of an employer for the acts of special policemen. The decisions indicate that such officers act sometimes as servants of the company by whom they are employed and sometimes as officers of the State. In *McKain v. Baltimore & O. R. Co.*, 23 L. R. A. (N. S.), 289, it said that the line of distinction marks the point at which the act ceases to be one of service to the employer and becomes one of vindication of public right or justice, the apprehension or punishment of a wrongdoer, not for the injury done to the employer, but to the public at large; also, that such appointees, though paid for their services by the persons at whose instance they are appointed, are not servants of such persons in respect to all the acts they perform by virtue of their offices, but only in respect to services rendered the company, such as defending or preserving its property.

The weight of authority maintains the position that special officers appointed by the State for police duty at the expense of a railway company or other corporation are prima facie public officers, for whose acts, as such officers, the corporation procuring the appointment is not liable; but if such officers are engaged in the performance of duties which they owe to their employers by reason of their employment and are acting within the scope of their powers and duties, they will be deemed servants or employees, and for their negligent or wanton acts done in the performance of assigned duties, their employers may be liable. *McKain v. Baltimore & O. R. Co., supra; Hershey v. O'Neill,* 36 Fed., 168; *Hardy v. Chicago, M. & St. P. R. Co.,* 58 Ill. App., 278; *Tucker v. Erie R. Co.,* 69 N. J. L., 19; *Sharp v. Erie R. Co.,* 184 N. Y., 100; *Healey v. Lothrop,* 171 Mass., 263; *Milton v. Missouri P. R. Co.,* 193 Mo., 46, 4 L. R. A. (N. S.), 282; *Tyson v. Joseph H. Bauland Co.,* 9 L. R. A. (N. S.), 267.

Whether at the time he shot the deceased Banks was acting in his capacity as servant or public officer is a question of fact for the jury. The petitioner's allegation that he was acting in the latter capacity must be taken as true, subject to traverse by the plaintiff in the Federal Court. Judgment

Reversed.

ASHLEY HORNE CORPORATION v. W. P. CREECH, ADMINISTRATOR OF THE ESTATE OF J. A. VINSON.

(Filed 28 June, 1933.)

1. Limitations of Actions B f—Claim held filed within one year of issuance of letters testamentary and action was not barred.

Mere notice to an executor of a claim against the decedent's estate, received without comment or approval by the executor, is not a filing of the claim within the meaning of the statute providing that where a person dies before the completion of the bar of the statute of limitations in his favor the claim will not be barred if it is one that survives and is filed with the personal representative within one year of the date of the filing of letters testamentary or of administration, C. S., 412, but where, after such notice, the executor carries the item as a debt on the books of the estate and reports it to the clerk as a debt owed by the estate, the executor's approval will be inferred, and the statute will not operate as a bar.

2. Compromise and Settlement B c—Under facts of this case item sued on held discharged by settlement of mutual accounts between parties.

Where there is evidence that a mercantile business carried on by the decedent and his son as a partnership was carried on by the son as executor for several years after the father's death, and that later the

business was incorporated without change of location or method of operation, those interested being the widow and children of the deceased, the son being in entire charge of the corporation, and that the son and the personal representative of a deceased customer came to an agreement as to the amounts due by the customer to the partnership and the corporation and the amounts due by each of these concerns to the customer, and that the personal representative paid the son the amounts due to each of the concerns by the customer, and the son promised to pay the personal representative the amount due by the partnership to the customer's estate, but failed to do so, and that thereafter the partnership went into bankruptcy and the personal representative received only a small part of the amount admitted to be due by the partnership: *Held*, sufficient to sustain the findings of fact by the court after reference that a settlement had been made between the corporation, the plaintiff in the action, and the personal representative of the customer, and to sustain the judgment of the court denying recovery against the personal representative on a guaranty on a note executed by the customer to the corporation for the purchase price of land sold.

CIVIL ACTION, before *Grady, J.*, at Chambers, 24 October, 1932. From JOHNSTON.

The plaintiff is a corporation and instituted this suit on 15 July, 1929, alleging that on or about 4 January, 1921, Albert Mials became indebted to it in the sum of $6,000, and as evidence of the indebtedness executed twelve promissory notes in the sum of $500.00 each, securing the payment thereof by a mortgage deed upon the land described therein. J. A. Vinson guaranteed the payment "of this mortgage and notes mentioned herein." It was further alleged that default was made in the payment of the notes and the land sold on 28 May, 1928, for the sum of $750.00, and that after deducting the expenses of the sale, there was available the sum of $725.00 to be applied on said indebtedness. Consequently the plaintiff asked for the recovery of $6,000 with interest subject to the said credit. The defendant filed an answer alleging that Vinson died about 1 May, 1923, leaving a last will and testament, and that his brother, J. T. Vinson, qualified as executor, and that J. T. Vinson, executor, died on or about 7 December, 1925, and the defendant, W. P. Creech, was duly appointed administrator to close up the estate. The defendant further alleged that Ashley Horne, a citizen of Johnston County, died in 1913, and was the owner of a large "landed estate" in Johnston County and elsewhere, and conducted a large general merchandise time-business in the town of Clayton under the firm and style name of Ashley Horne and Son, C. S. Horne being a partner in the business. That plaintiff's testator, J. A. Vinson, conducted large business transactions with the said Ashley Horne and Ashley Horne and Son, "and made them the depository for any accumulations of his estate and sold and delivered to them cotton and cotton seed from his farm from time to time and from year to year without having yearly settle-

ments therefor, but generally conducting a running account for said business. That after the death of Ashley Horne the business of Ashley Horne and Son was conducted by C. W. Horne, the surviving partner, and this defendant is informed and believes the management of the entire property of Ashley Horne was continued by C. W. Horne without change in the character of their operations, though this defendant is informed and believes that an attempt was made in 1914 to organize what was known as the Ashley Horne Corporation and put the farm lands of the said Ashley Horne into said corporation; and that thereafter the said J. A. Vinson continued to deal with the said C. W. Horne, who was the president of the attempted organization of Ashley Horne Corporation, and was conducting and managing the said business of Ashley Horne and Son, and the said J. A. Vinson continued to deal with the said C. W. Horne, Ashley Horne and Son and the "landed estate" of said Ashley Horne as if there had been no change in the same, and was from time to time advised that it was all one business until the time of his death." J. T. Vinson, executor of J. A. Vinson, "undertook to have and did have for said plaintiff and Ashley Horne and Son, represented by C. W. Horne, a full and complete final settlement of all matters and things involved between the plaintiff and Ashley Horne and Son and the said J. A. Vinson." The defendant further alleged "that more than three years have elapsed prior to the bringing of this action since the accrual of any liability which this defendant may have had to the plaintiff, and this defendant expressly pleads such lapse of time in bar of any recovery." The defendant further pleaded a counterclaim.

After the cause was at issue Judge W. A. Devin, at the September Term, 1931, referred the same to Honorable Oliver G. Rand, as referee, to hear the evidence, find the facts, and report his conclusions of law. After conducting hearings and assembling the evidence the referee found certain facts and conclusions of law. He found that the plaintiff was entitled to recover judgment against the defendant, and that the defendant was entitled to a counterclaim against the plaintiff in the sum of $427.79. Exceptions were filed by the defendant to the report of the referee, and thereafter the parties agreed that the trial judge might hear the argument, consider the exceptions, the report of the referee, the evidence taken before him, and pass upon all questions involved. Pursuant to such agreement Judge Grady, signed the following judgment and findings of fact:

1. "That the plaintiff is a domestic holding corporation and the defendant is the administrator *c. t. a., d. b. n.* upon the estate of the late J. A. Vinson, having qualified as such after the death of J. T. Vinson, executor, named in the will of the said testator.

2. "Ashley Horne, late of Johnston County, died during the year 1913, leaving a large estate, personal and real, and among his various enterprises one was known as Ashley Horne and Son, which was a mercantile business located at Clayton in Johnston County. After his death in 1913, on 14 November, 1914, his widow and children organized the plaintiff corporation, and conveyed to it a large part of the landed estate which had descended to them under the law.

"3. The widow and children of Ashley Horne were the only stockholders in said corporation up to the year 1928.

"Charles W. Horne, a son, administered upon his father's estate, and entered into bond in the penal sum of $240,000, with Rena B. Horne and Swannanoa Horne as sureties thereon. Since his administration in 1913 Charles W. Horne has never filed any report in the clerk's office until 1928, when a report was prepared by an auditor and is now on file in said office.

3. "After the death of Ashley Horne in 1913 Charles W. Horne continued the business of Ashley Horne and Son, and after the issuance of the certificate of incorporation for Ashley Horne Corporation he managed that business also as its president and executive head.

"The court finds as a fact that Charles W. Horne was in control of both the plaintiff corporation and Ashley Horne and Son, occupying one office, and he being the final judge as to the methods and policies of both concerns.

4. "The court finds as a fact that in reality Ashley Horne Corporation and Ashley Horne and Son were but continuations of the estate of Ashley Horne, deceased, under different heads; and, disregarding the corporate fiction in respect to Ashley Horne Corporation, that the two institutions were in fact but one, under the dominant, paramount and controlling mind of Charles W. Horne. The records of the corporate department show conclusively that he administered its affairs with a free hand, without any direction or suggestion from the other stockholders or directors, and that all he did was ratified and approved by them.

5. "On 4 January, 1921, Ashley Horne Corporation conducted a land sale, at which J. A. Vinson purchased certain lands at an agreed price of $6,000. No deed was made to him, but by agreement his bid was assigned to one Albert Mial, to whom a deed was made, and he in turn executed to the plaintiff his 12 promissory notes under seal, each for $500.00 and payable annually on 1 January, 1922 to 1933, respectively, each drawing interest from date at six per cent per annum. Said notes were secured by mortgage deed on the property in question, and J. A. Vinson endorsed the notes.

"It was provided in said notes and in said mortgage deed that if default should be made in the payment of either one of the same that

the due date of all should thereby be accelerated, and all were to become immediately due and payable without demand.

6. "Default was made in the payment of the first note on 1 January, 1922, and thereupon the entire debt became due and payable without demand; and on said date the liability of J. A. Vinson became absolute, and the statute of limitations began to run in his favor.

"This fact is found by the referee, and there is no exception to his finding or conclusion of law in that respect.

7. "J. A. Vinson died on 1 May, 1923, and J. T. Vinson qualified as executor upon his estate, and assumed the management thereof as provided by law. Plaintiff had actual knowledge of the death of J. A. Vinson, and the administration of J. T. Vinson upon said estate. After his qualification as executor there were several conversations between him and the plaintiff in respect to the Albert Mial notes; but no claim was ever filed with him by the plaintiff, and neither he nor his successor, W. P. Creech, ever promised to pay said notes, or any part thereof. The referee finds as a fact, that said notes were carried on the books of J. A. Vinson's estate as a liability, and that finding is approved by the court; but in addition thereto the court finds that said notes were never presented for payment in the manner required by law.

8. "On or about 24 February, 1924, the Albert Mial notes were delivered to J. R. Williams, an attorney at law of Clayton, N. C., and he was requested by the plaintiff to foreclose the same. Said Williams was the regular attorney for the Vinson estate, but in this particular instance he was acting for the plaintiff, more as a favor than otherwise, and charged nothing for his services. At the sale conducted by him, J. T. Vinson bid in the land, but the sale was never consummated, and was abandoned at the time. Finally on 15 October, 1928, said mortgage was foreclosed, and a deed made to the purchaser by the plaintiff corporation, the land being bid in for the sum of $725.00.

9. "During the lifetime of J. A. Vinson there were numerous business dealings between him and Ashley Horne Corporation and Ashley Horne and Son; and after his death there was a meeting arranged between T. F. Vinson and Charles W. Horne, at which a settlement was agreed upon between them in respect to said accounts. It was agreed that Vinson should present his bills against Ashley Horne Corporation and Ashley Horne and Son, and that said Charles W. Horne should present the bills of both concerns against the Vinson estate; and that upon an agreement and adjustment of their respective claims, checks were to be issued by each in settlement of the other's claims.

10. "The parties agreed upon the amounts due, each by the other, and J. T. Vinson, acting in good faith, and fully relying upon the integrity of Charles W. Horne, executed and delivered to him checks aggregating the sum of $14,712.73, representing the amount that the

Vinson estate owed Ashley Horne Corporation, and also checks for several thousand dollars, representing the amount due by said estate to Ashley Horne and Son.

"Charles W. Horne in turn was to execute and deliver to J. T. Vinson his checks in the total sum of $21,776.67, in settlement of all amounts due him by Ashley Horne and Son.

"The checks issued by J. T. Vinson were deposited by Charles W. Horne, and paid by the bank, and his companies received the full benefit thereof. However, no checks were ever issued by him to J. T. Vinson, executor, for the agreed balance of $21,776.67, although it was expressly understood and agreed that he should do so, and Vinson's checks to him were issued upon that understanding and no other.

"Charles W. Horne walked out of the conference with Vinson's checks in his pocket, promising to issue his checks in return as soon as he could find his bookkeeper; but his bookkeeper must have disappeared over the rim of the earth, as no such checks were ever issued.

"Shortly after the transaction above set forth Ashley Horne and Son went into bankruptcy, and Vinson's estate fell heir to the infinitesimal dividends in such cases made and provided.

"Creech, the administrator, has filed a claim with the bankruptcy court for his claim of $21,776.67; but there is no evidence that anything of value will ever be realized thereon.

11. "The court finds that at the settlement between J. T. Vinson, executor, and Charles W. Horne, referred to in finding No. 10, it was contemplated by the parties that said settlement should embrace and include all claims and demands then outstanding in favor of either party against the other; that at said meeting Charles W. Horne represented all of the agencies, corporations and combinations of the Ashley Horne estate. The court is of the opinion that inasmuch as Charles W. Horne was in the active, actual and sole control of the different departments in question, both as to the Ashley Horne Corporation and Ashley Horne and Son; and owing to the fact, as found by the referee (approved by the court) that Charles W. Horne left the conference without giving his checks as promised, there was a fraud practiced by said Charles W. Horne upon J. T. Vinson, executor, and that it would be unjust, inequitable and a manifest miscarriage of justice to permit the plaintiff in this case to recover anything out of the defendant.

12. "The court finds that the claim of the plaintiff is barred by the statute of limitations; and it also finds as a fact that any claim that the plaintiff might have had against the defendant was included in the settlement referred to in finding No. 10 hereof, and that the plaintiff is not entitled to maintain this action for that reason, if for no other.

13. "The defendant has entered a counterclaim against the plaintiff, as will appear by reference to the answer. To this counterclaim the

plaintiff pleads the statute of limitations. The cause of action set out in the counterclaim is also barred by the statute of limitations, and this is found to be a fact by the court.

"All findings of fact by the referee which are in harmony with the foregoing findings by the court, are approved; and all findings of the referee which are at variance with said findings by the court are disapproved, and overruled.

"All exceptions filed by the defendant which are in harmony with the court's findings of fact are sustained; and all other exceptions are overruled.

"Upon the findings as hereinbefore set out, and the conclusions of law arrived at by the court, it is now considered, ordered and adjudged that the plaintiff is not entitled to recover anything by its writ, and the action is dismissed; it is also adjudged that the defendant is not entitled to recover anything on his counterclaim, and said counterclaim is dismissed.

"The costs of this action, including an allowance to the referee to be fixed by the court will be taxed against the plaintiff, and the surety on its prosecution bond by the clerk of this court.

"Done at Pittsboro, N. C., this 24 October, 1932."

From the foregoing judgment the plaintiff appealed.

Abell & Shepard and Biggs & Broughton for plaintiff.
Larry I. Moore for defendant.

BROGDEN, J. The two paramount questions of law involved in the appeal are:

1. Is the claim of the plaintiff barred by the statute of limitations?

2. Was there any evidence to support the findings of fact by the trial judge in findings Nos. 9 and 10 that there was a full settlement of all matters in dispute between all the parties?

The referee found that the first one of the Mial notes to the plaintiff matured on 1 January, 1922, and that there was an acceleration clause in each note "providing that in default in payment of either principal or interest that then the whole debt, as evidenced by the other bonds, should become due at once without demand. The entire indebtedness represented by the said bonds became due and payable on 1 January, 1922." The trial judge approved this finding of fact. Consequently, as Vinson died in May, 1923, the statute of limitations had commenced to run in his lifetime. Hence C. S., 412 becomes pertinent to the inquiry. This statute provides in substance that if the statute of limitations begins to run against a person in his lifetime and he dies before the bar is complete, and the cause of action survives," an action may be

commenced against his personal representative after the expiration of that time and within one year after the issuing of letters testamentary or of administration. . . . If the claim upon which the cause of action is based is filed with the personal representative within the time above specified and admitted by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative upon such claim after his final settlement."

Applying this statute to the facts, two questions arise: First, did the plaintiff file a claim within one year with the personal representative of J. A. Vinson, and second, did such personal representative admit the claim? The statute began to run on 1 January, 1922, and this suit was brought in July, 1929, so that if the claim of the plaintiff was not filed with and admitted by the personal representative, the claim is outlawed and the plaintiff must go out of court.

No particular form is prescribed by law with respect to the meaning of the term "filing." In some of the old books it was intimated that it was the duty of an executor or administrator to "string the claims" submitted to him for payment. The question has been discussed in the following cases: *Flemming v. Flemming,* 85 N. C., 127; *Whitehurst v. Dey,* 90 N. C., 542; *Woodlief v. Bragg,* 108 N. C., 572, 13 S. E., 211; *Turner v. Shuffler,* 108 N. C., 642, 13 S. E., 243; *Grady v. Wilson,* 115 N. C., 344, 20 S. E., 518; *Stonestreet v. Frost,* 123 N. C., 640, 31 S. E., 836; *Hinton v. Pritchard,* 126 N. C., 8, 35 S. E., 127; *Justice v. Gallert,* 131 N. C., 393, 42 S. E., 850. These cases enunciate certain indicia for solving the question involved: (a) The personal presentation of a claim to an administrator or executor, stating the amount thereof, is not a sufficient filing to suspend the running of the statute when the administrator is silent and neither rejects the claim nor admits liability. *Flemming v. Flemming, supra.* (b) The mere holding of a claim by a personal representative without objection, is not *per se* an admission of its correctness. (c) Where the administrator advised the claimant that it was not necessary to get a lawyer "that he would see the judge and do whatever he said" did not amount to a filing or waiver of the statute. *Grady v. Wilson, supra.* A claimant cannot compel an administrator "to string the claims," but if the validity of the claim is expressly recognized or admitted, this will constitute a filing. Perhaps the clearest statement of the principle appears in *Justice v. Gallert, supra,* where the Court holds that a claimant has done all he is required to do "when he has presented it to the administrator with sufficient identity as to the nature and amount of the debt, and the admission of its validity by the administrator dispenses with any formal proof thereof."

Applying these principles to the evidence, it appears that the secretary and treasurer of the plaintiff corporation said: "After I gave him as executor notice concerning the claim, Mr. J. T. Vinson came in and looked over the notes. Mr. J. T. Vinson, as executor of the estate of J. Arch Vinson, after I gave him notice and after he examined the note, did not deny liability on the part of the estate. He did not question the claim." Mere silence of an administrator when a claim is presented, does not suspend the running of the statute. *Fleming v. Fleming, supra.* However, the defendant Creech testified that "when I became administrator of the estate of Mr. J. A. Vinson, I went over the assets and claims against the estate. I found the Albert Mial note listed in the amount outstanding against the estate. . . . I reported to the court that the claim was unpaid. I had an audit made and filed it with the clerk of the Superior Court." Manifestly, whether an administrator has said anything or not when a claim is presented, if such claim is thereafter set up on the books of account of the estate as a liability of the estate, and so reported to the clerk in the official report of the personal representative, such act or conduct constitutes a filing of the claim. Therefore, the first question of law involved in the appeal must be answered in the negative.

With reference to the question as to settlement between the parties, it appears from the evidence that the Horne Corporation was composed of the children of Ashley Horne. C. W. Horne, a son of Ashley Horne, was the president of the corporation and general manager of the business. C. W. Horne was also a member of the partnership of Ashley Horne and Son, and the evidence tends to show that the Horne business was carried on in the same building, according to the same methods, and in the same offices, theretofore used prior to the death of Ashley Horne in 1913. Indeed there was evidence that C. W. Horne had stated that it was the same business and that the whole estate was liable for the operation of the business enterprises. There was also evidence that on the night of 11 February, 1924, J. T. Vinson executor, had an engagement with C. W. Horne to settle the mutual accounts between his testator, J. A. Vinson, and the Horne Corporation, and the mercantile business of Ashley Horne and Son, and that after the amounts had been determined, Vinson, executor, gave a check in full, which was received by C. W. Horne, and Horne promised to give Vinson a check for the amount due the estate of his testator by Ashley Horne and Son, on the next day. The check was not forthcoming, and shortly thereafter Ashley Horne and Son was adjudicated a bankrupt.

In cases of this type the eye of the law sinks deep into the situation and dealings between the parties to discover the heart of the transaction. The law moves along straight lines to ascertain, establish and enforce

fundamental justice between men and does not dissipate its energies in fencing with legal fictions, boxing with legal shadows, and wrestling with legal puppets.

It cannot be said that there is no competent evidence to support the findings of fact made by the trial judge to the effect that there had been a settlement between the parties. Therefore, the findings must stand, and the judgment is approved.

Affirmed.

MARY BELLE BROWN v. E. A. BROWN.

(Filed 28 June, 1933.)

Divorce E a—Judgment upon deed of separation held complete bar to application for alimony pendente lite.

Where the husband and wife execute a deed of separation in conformity with the statutes, C. S., 2515, 2516, 2529, and without coercion or undue influence, which provides for the transfer of certain real estate and personal property to the wife and in which they agree to live separate and apart from each other and to release each other from all property and other rights arising out of the marital relationship, and the deed of separation is approved by a consent judgment upon findings by the court that the terms of the deed of separation were not injurious to the wife and were fair and reasonable: *Held*, the consent judgment may be pleaded as a complete bar to the wife's application for alimony *pendente lite* and for reasonable counsel fees, C. S., 1666, in the wife's subsequent action for divorce *a mensa et thoro*, C. S., 1660, and an order denying the application for alimony and retaining the cause for trial upon the issue of the wife's right for divorce *a mensa* is not erroneous.

BROGDEN, J., concurring.

STACY, C. J., and CONNOR, J., dissenting.

APPEAL by plaintiff from *Barnhill, J.*, at Chambers in Durham, N. C., 20 September, 1932. Affirmed.

Plaintiff set forth fully her grievances in her complaint against defendant, and her prayer for relief is as follows: "Wherefore, the plaintiff prays: first, that the plaintiff be granted a divorce *a mensa et thoro* from the defendant; second, that the defendant be compelled to support the plaintiff and her children according to his means and station in life; and third, that pending the final determination of this action he be required to contribute a reasonable amount for the support of the plaintiff and said children, and that the defendant be likewise required to pay reasonable attorney's fee to the plaintiff's attorneys, and that she have such other and further relief to which she may be entitled."

The defendant, in answer, after denying the material allegations of plaintiff's complaint, says: "That these matters and things are not the proper subject of an action by plaintiff against this defendant, as all of the material allegations set forth in the complaint of the plaintiff have been fully, finally and completely determined and settled by a former judgment of the Superior Court of Orange County, which judgment is now specifically pleaded by this defendant, upon the ground that all of said matters and things have been fully and finally determined and same are now *res judicata.* Wherefore, having fully answered the complaint of the plaintiff herein filed, the defendant now asks that said complaint be dismissed, that the plaintiff take nothing by her action, and that the defendant go without day and recover his costs as taxed by the court."

The judgment of Judge Devin, signed at December Term, Orange County Superior Court, set forth as an estoppel by defendant, is as follows: "This cause coming on to be heard before the undersigned judge presiding at the December Term of the Superior Court of Orange County at Hillsboro, and it being heard, and it appearing to the court that this action was commenced by the plaintiff against the defendant pursuant to section 1667 of the Consolidated Statutes of North Carolina to have secured to her from the property and earnings of the defendant a reasonable subsistence, and, it further appearing to the court that the plaintiff and defendant and their counsel have agreed upon a division of the property of the defendant and a permanent separation of the plaintiff and defendant, all as set out in a certain separation agreement, dated 10 December, 1928, a copy of which is attached hereto and made a part of this judgment. After due inquiry the court being of the opinion that the division of the property as set out in the separation agreement, is a fair and equitable one and not in any way injurious to the plaintiff; it is now, therefore, by consent ordered, adjudged and decreed that the separation agreement made and entered into between the plaintiff and defendant, a copy of which is attached hereto, be and the same is hereby in all respects approved, and that the permanent custody of the children of the plaintiff and defendant be committed to Mary Belle Brown, and that out of the property conveyed to her, she shall support and maintain them. It is further ordered and decreed that the defendant pay all costs of this action, together with the interest on the indebtedness of $4,000 owing by him on the property awarded to his wife to 10 December, 1928. It is further ordered and adjudged that the notes heretofore made by the defendant and secured by deed of trust on the property awarded to the plaintiff be canceled within sixty days from 10 December, 1928, so that the same may not be an outstanding liability of the defendant. It is further ordered and adjudged that

the defendant give the plaintiff immediate possession of the real estate described in said separation agreement, and that the rents accrued thereon from and after 10 December, 1928, shall be payable to her. (Signed) W. A. Devin, judge presiding. By consent: (Signed) A. H. Graham, attorney for E. A. Brown. North Carolina, Orange County: These articles of agreement entered into between E. A. Brown, of Orange County, N. C., and Mary Belle Brown, of Orange County, N. C., this 10 December, 1928. Witnesseth: That, whereas, the said E. A. Brown and Mary Belle Brown were lawfully married in Alamance County, North Carolina, on 11 March, 1911. That there have been born of said marriage two children, Otway Brown, now of the age of 15 years, and Mary Madelaine Brown, now of the age of 11 years. That the said E. A. Brown and Mary Belle Brown lived together as man and wife until 27 October, 1928, on which date they separated, being unable to agreeably live together as man and wife; and whereas, it is mutually agreeable that they shall each live separate and apart from the other; now, therefore, for and in consideration of the conveyance to the said Mary Belle Brown by E. A. Brown of the following two described tracts of real estate, situate in the town of Chapel Hill, N. C., described as follows, to wit: (Description of property.) Which conveyance has been effected by deed of even date herewith, the receipt of which is hereby acknowledged and which is accepted subject to encumbrances amounting to four thousand dollars, with interest paid thereon to 10 December, 1928. Also the delivery of possession to Mary Belle Brown of the household and kitchen furniture now in the large dwelling-house on tract number one above described, excepting therefrom only the personal effects of E. A. Brown, one iron safe, and one walnut bedroom set. The said E. A. Brown and Mary Belle Brown do mutually agree to live separate and apart from one another, and in consideration of the said conveyance of real estate, to her, the said Mary Belle Brown agrees and by these presents does agree to release and relinquish all right of support, all right of dower, and all other personal and property rights which she might have acquired, against the person or property of the said E. A. Brown by virtue of the aforesaid marriage, and does hereby receive and accept the aforesaid deed in full settlement and satisfaction of all and every right that she may hold against the person or estate of the said E. A. Brown in consequence of the aforesaid marriage, and she does further agree to abandon, relinquish, and release the said E. A. Brown of all and every right of suit that she might have against him by reason of any act of abandonment that he might have committed in the past, and further agrees to release him of any claim which she might have against him by reason of the aforesaid marriage. And in consideration of the delivery of the aforementioned deed of conveyance,

receipt of which is hereby acknowledged, the said Mary Belle Brown does hereby agree and obligate herself to look after, control, maintain and support the two children, Otway Brown and Mary Madelaine Brown, and further agrees and binds herself to hold the said E. A. Brown free and harmless from any claim which the said minors Otway Brown and Mary Madelaine Brown have or might have against the said E. A. Brown for support and maintenance. And the said E. A. Brown agrees to release the said Mary Belle Brown of all and every right of courtesy and all rights that he acquired in any property that she might have by reason of the conveyance herein referred to or otherwise, or might in the future possess, and all personal rights that he might have acquired against her by virtue of the aforesaid marriage, and the said E. A. Brown does hereby surrender and give over to Mary Belle Brown full and complete care, custody and control over the two children born of their marriage, to wit: Otway Brown and Mary Madelaine Brown, releasing unto the said Mary Belle Brown any rights which the said E. A. Brown may have as the natural father of the said children. It is mutually agreed that the said E. A. Brown and Mary Belle Brown shall each live separate and apart from the other independent of the other to the same extent as if they had never been married and each shall in the future contract and be contracted with independent of the other to the full extent as if they had never been married. It is further mutually understood and agreed that the execution and delivery of this instrument and the acceptance and registration of the same shall constitute a complete separation of the parties hereto to the end that either may do with their respective property as they may see fit and that they may be enabled to make, sell, convey, or otherwise dispose of said property free and discharged from any claim or demand present or prospective which either party might otherwise have by virtue of their marriage hereinbefore referred to. In testimony whereof the said E. A. Brown and Mary Belle Brown have hereunto set their hands and seals this 10 December, 1928. E. A. Brown (Seal)—Mary Belle Brown (Seal)."

The judgment of the court below is as follows: "This cause coming on for hearing before his Honor, M. V. Barnhill, judge, at Chambers in Durham, N. C., on Tuesday, 20 September, 1932, at 12:00 o'clock noon, upon the motion of the plaintiff asking for an order directing the defendant to pay to the plaintiff a reasonable monthly amount for the support of the plaintiff and her children, and for reasonable attorney's fees pending the final trial of the action, which is in the nature of a suit for divorce *a mensa et thoro;* and after hearing the pleadings read by attorneys representing both parties to this action, and the plaintiff through her attorney, Mr. Robert T. Giles, having admitted that practically the same allegations as contained in Articles I, II, III, IV, V, VI,

and VII in the present complaint were embodied in a former complaint filed by the plaintiff on 2 November, 1928, and that a deed of separation was duly entered into between said plaintiff and defendant on 10 December, 1928, which deed of separation, after being duly approved by the court, was recorded in the office of the register of deeds of Orange County, and that the provisions embodied in said deed of separation were approved and confirmed by a final judgment signed by his Honor, W. A. Devin, judge presiding at the December Term of Orange Superior Court, 1928. Now, therefore, upon the foregoing facts, the court is of the opinion that the motion of the plaintiff in the present action cannot prevail and that the plaintiff is barred by the former judgment of the court dealing with the same subject-matter, and the motion of plaintiff for monthly maintenance and support for herself and her children and attorneys' fees pending the final trial of this suit for divorce is accordingly denied, and the action is allowed to remain on the calendar of the Orange Superior Court for the determination of the question of divorce sued for in said complaint, and for this purpose only."

The defendant, after pleading estoppel in his answer to his wife's complaint, among other things says: "At the instigation of plaintiff (his wife) this defendant was committed to the State hospital for the insane . . . that he was released over her (his wife's) zealous activities expended in preventing said release . . . that a jury of Orange County citizens declared defendant sane during the month of July, 1928." The defendant further says: "That defendant's health has been bad for several years and that he is unable to do hard physical work, but in order to try to make a living he has been operating a small furniture store; that the capital invested in said furniture store is only $600.00, of which amount defendant owns one-half. That defendant has further been renting a room in which to sleep and has been paying therefor the sum of $1.25 per week, and has in order to save as much as possible done his own cooking over a small oil stove in the basement of the furniture store which he is now attempting to operate. That considering board and lodging and clothes, defendant asserts that he has not expended upon himself more than $104.00 during the past eight months and has been just as economical as it is humanly possible to live, trying in every way to save, but due to depressed conditions, defendant has been unable to acquire or save any property and that now if a settlement of his obligations were had, he would be found to be insolvent."

The plaintiff excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

R. T. Giles and W. S. Roberson for plaintiff.
Graham & Sawyer for defendant.

CLARKSON, J. The only question involved on this appeal is whether the consent judgment and separation agreement made between plaintiff and defendant is a bar to plaintiff's action under C. S., 1666. We think so.

A separation agreement between husband and wife must be fair and reasonable and entered into without coercion or undue influence. Separation agreements are not favored by law, but under certain circumstances are recognized by statutes when signed in conformity thereto. C. S., 2515, 2516, 2529; *Taylor v. Taylor,* 197 N. C., 197, 148 S. E., 171.

The terms of a separation agreement between husband and wife were enforced in *Peeler v. Peeler,* 202 N. C., 123. One of the provisions in this separation agreement between plaintiff and defendant is clearly stated as follows: "The said E. A. Brown and Mary Belle Brown do mutually agree to live separate and apart from one another, and in consideration of the said conveyance of real estate, to her, the said Mary Belle Brown agrees and by these presents does agree to release and relinquish all right of support, all right of dower, and all other personal and property rights which she might have acquired, against the person or property of the said E. A. Brown by virtue of the aforesaid marriage, and she does further agree to abandon, relinquish, and release the said E. A. Brown of all and every right of suit that she might have against him by reason of any act of abandonment that he might have committed in the past, and further agrees to release him of any claim which she might have against him by reason of the aforesaid marriage."

Defendant has fully performed his part of the separation agreement with plaintiff and consent judgment. Plaintiff received certain property on the distinct agreement that it was to release and relinquish all right of support she had by virtue of her marital rights with defendant. She was *sui juris* when she consented to the judgment and made the agreement—no fraud or mistake is alleged on her part. We think that she is estopped by the judgment and agreement.

We do not think *Bailey v. Bailey,* 127 N. C., 474, applicable. At p. 475, it is said: "No separation is hinted at, even, and the matter seems to have been purely a business transaction in reference to the property owned by each of the parties to the instrument." The agreement did not indicate that the parties were living separate and apart, and the language did not in clear terms, as the present "release and relinquish all right of support," etc. In the *Bailey case* the parties were living together and expected to continue, and the husband to support his wife.

The court below set forth in the judgment: "After due inquiry the court being of the opinion that the division of the property as set out in the separation agreement, is a fair and equitable one and not in any way injurious to the plaintiffs," etc.

The court below also stated in the judgment: "The action is allowed to remain on the calendar of the Orange Superior Court for the determination of the question of divorce sued for in said complaint, and for this purpose only." This action is also for divorce *a mensa et thoro* under C. S., 1660, and it is retained for that purpose. *Lentz v. Lentz,* 193 N. C., 742. See *Sanders v. Sanders,* 167 N. C., 317; *Archbell v. Archbell,* 158 N. C., 408. The judgment of the court below is

Affirmed.

BROGDEN, J., concurring: The major point in the case is whether the trial judge had the power to make the requested allowances to the plaintiff. Obviously, an allowance to a wife by whatever name called, is payable from the estate or earnings of the husband, and necessarily affects a property right. It appears from the record that the husband and wife entered into an agreement with the approval and sanction of a court of justice whereby the parties should live "separate and apart from the other independent of the other to the same extent as if they had never been married, and each shall in the future contract and be contracted with independent of the other to the full extent as if they had never been married." It is further agreed that the wife "does hereby receive and accept the aforesaid deed in full settlement and satisfaction of all and every right that she may hold against the person or estate of said E. A. Brown in consequence of the aforesaid marriage." The right to support grows out of the marital status and is personal to the wife. In other words, if the wife does not seek support in accordance with the provisions of the statute, no one else has any standing in court to speak for her or to enforce her rights in that particular. Public policy recognizes the right of a wife to contract with her husband with reference to mutual property rights or with reference to separation agreements based upon a mutual release of property rights. If the right of alimony and counsel fees is a property right, growing out of marriage, and the wife has the power to contract and does contract with reference thereto, with the approval and sanction of a court, then it would seem that a judge had no discretion in the matter. Discretion exists only when a matter is open for negotiation and not precluded by a provision of the law or a valid agreement of the parties. Consequently, I am of the opinion that the trial judge had neither the power nor the discretion to dip his hand into a pocket which was protected by a valid contract of a person under no disability and under the solemn sanction of the judgment of a court of competent jurisdiction.

STACY, C. J., dissenting: This is a civil action for divorce *a mensa et thoro* under C. S., 1660, with application for alimony *pendente lite* under C. S., 1666.

Several years prior to the bringing of the present action, plaintiff instituted suit against the defendant for subsistence without divorce under the provisions of C. S., 1667. Pending final determination of said action, plaintiff and defendant executed a separation agreement, in which, among other things, it was provided that certain real estate should be conveyed to the plaintiff out of which she was to care for herself and two minor children, and both husband and wife reciprocally undertook to release each other from any and all property rights, personal obligations and liabilities of any and every kind, which had arisen, or might thereafter arise, out of, or on account of, their said marriage. The defendant has complied with his part of the contract.

This agreement was filed as a consent judgment in the case, which judgment further recites that after due inquiry, the court is of opinion "the division of the property as set out in the separation agreement is a fair and equitable one and not in any way injurious to the plaintiff."

Upon application for alimony *pendente lite* in the instant suit, the aforesaid judgment was held to be an estoppel or a bar to plaintiff's right to alimony *pendente lite* and reasonable counsel fees in the present proceeding. The cause was retained for a trial on the allegations looking to a divorce.

Articles of separation between husband and wife were originally regarded as unenforceable in the courts, because contrary to public policy (*Collins v. Collins,* 62 N. C., 153); later they were thought to rest on tenuous ground (*Sparks v. Sparks,* 94 N. C., 527); but with subsequent changes in the statute law, they were upheld where the separation had already taken place or immediately followed (*Archbell v. Archbell,* 158 N. C., 408, 74 S. E., 327; *Moore v. Moore,* 185 N. C., 332, 117 S. E., 12); and, finally, in *Lentz v. Lentz,* 193 N. C., 742, 138 S. E., 12, a husband was required to abide the terms of his agreement even after divorce. See, also, *S. v. Gossett,* 203 N. C., 641, and *Taylor v. Taylor,* 197 N. C., 197, 148 S. E., 171.

Conceding that the language of the instant agreement is broad enough to cover property rights, personal obligations and liabilities of any and every kind arising out of the marriage status, still it does not follow, as being within the contemplation of the parties, that, in case of subsequent action for divorce, any matter of law or judicial discretion arising therein should be regarded as covered by said agreement. *Davidson v. Davidson,* 189 N. C., 625, 127 S. E., 682. Undoubtedly, the judge might take the separation agreement into account in passing upon the plaintiff's application, but it is not considered as an estoppel, or a bar, to her right to make the application.

That articles of separation and a division of property do not bar the wife's claim against her husband for temporary alimony or suit

money in an action for divorce, where she has not sufficient means, is the holding in *Miller v. Miller,* 1 N. J. Eq., 386, *Wilson v. Wilson,* 40 Iowa, 232, *Killiam v. Killiam,* 25 Ga., 186, *Coles v. Coles,* 2 Md. Ch., 341, and *Campbell v. Campbell,* 73 Iowa, 482. See, also, valuable note, 83 Am. St. Rep., 859, *et seq.*

CONNOR, J. I concur in the dissenting opinion filed by *Stacy, C. J.,* in this appeal.

The duty, both legal and moral, of a husband to support his wife does not arise out of contract, nor is the right of the wife to support by her husband contractual in its origin. Both the right and the duty arise out of and are incidents of their marital status. Therefore, neither the right nor the duty are subject to contract between the husband and wife, by which the wife is deprived of her right or the husband relieved of his duty. The power of a court in a proper case to order the husband to provide reasonable subsistence for his wife, *pendente lite,* and to pay her counsel fees, in accordance with statutory regulations, is not affected by the provisions of a separation agreement between the husband and wife. The State as a social agency is interested that the wife shall not be deprived of her right or the husband relieved of his duty.

I think there was error in the order in the instant case, denying the application of the plaintiff as a matter of law.

IN RE WILL OF SUDIE HARGROVE.

(Filed 28 June, 1933.)

1. Evidence H c: Wills D h—Declaration in interest of declarant held incompetent as hearsay and irrelevant to issue of mental capacity.

The nieces and nephews of deceased filed a caveat to her will which was tried solely on the question of the mental capacity of testatrix. Caveators introduced in evidence a declaration of their deceased father, brother of testatrix, which had been entered of record in the public records in a certain county of another state and which set forth declarant's contention that he had not been paid his distributive share of his father's estate and which sought to preserve evidence thereof for the benefit of declarant's wife. The will devised the property formerly comprising the estate of testatrix's father. *Held,* the declaration was in the interest of declarant and was incompetent as hearsay evidence and was irrelevant to the issue of mental capacity involved in the trial, and its admission constituted reversible error.

2. Evidence H d—Declaration made by party interested in event is incompetent to prove pedigree.

In order for a declaration as to pedigree to be competent in evidence it is required that it be made *ante litem motam* and that the declarant be disinterested, and a declaration made by the father of caveators which in substance sets forth the declarant's contention that he had not been paid his distributive share of his father's estate and failing to identify caveators as his sons is held incompetent to prove blood relationship in caveators' action to set aside the will of their father's sister disposing of property formerly comprising the estate of testatrix's father.

CIVIL ACTION, before *Moore, Special Judge,* at December Term, 1932, of SAMPSON.

Sudie Hargrove died 15 April, 1930, leaving a last will and testament, which was executed on 27 February, 1906. The will is as follows: "This is to be a memorial to our father, Benjamin Hargrove from his daughters, E. J. and Sudie Hargrove.

1. "Sudie Hargrove, of the county of Sampson, in the State of North Carolina, near Faison, do give and bequeath to the trustees of the Episcopal Church in the Diocese of East Carolina, in the State of North Carolina, all my personal and real estate to have and hold, the real estate to be held in full for one hundred years. If, at the end of that time, the Bishop and trustees think it the best for the good of the church, they can sell one-half of the land and keep the half on which my father is buried. If, as time goes on, they, the bishop and trustees think best to sell more, they can sell all but one hundred acres, and this one hundred acres, which is to be around my father's grave, is to be held by the church as long as it stand.

"One-half of the income of this property is to be used for the good of the church, as the bishop and trustees shall decide; the other half to be used to send good preachers to the scattered church people, not in any particular place, but wherever the bishop, with his Savior to guide him, thinks it will help humanity to be better. A report of the use and the amount of the income is to be made by the bishop and trustees every year to the council of the Diocese.

"Now for the minor bequests: The Negroes that belonged to Benjamin Hargrove are to have one acre of ground to bury them and their families at the Negro graveyard. The Negroes that belonged to Benjamin Hargrove, and are on the place when I die, are to have a home their lifetime, not a living but a place they can call home, and fire wood for their personal use. At the termination of the lives of the said Negroes, their interest shall vest in the trustees of the Diocese of East Carolina, in the State of North Carolina, in like manner as the other has devised.

"Now, I want my dogs that I have when I die to be taken care of and not sold nor abused during their lifetime.

"Now my last request is to be buried by the church and be put away decently when I die.

"I hereby revoke all other wills by me heretofore made, and made 27 February, A.D. 1906, this will. Sudie Hargrove."

Thereafter, in 1931, E. C. Hargrove and B. F. Hargrove, nephews of the deceased, filed a caveat to the will, alleging that "Sudie Hargrove did not have the capacity to make and execute a will, and that she was not of sound and disposing mind and memory at and during the said time." The evidence tended to show that Ben Hargrove had five children, to wit, John A. Hargrove, William, George W., Elizabeth or Lizzie, and Sudie. William lost his interest in his father's estate by virtue of the power of sale in a mortgage. John A. also disposed of his interest in the estate. George W. Hargrove left North Carolina in 1877 or 1879, and did not return to Sampson County until 1923. Elizabeth or Lizzie Hargrove died in 1905, devising her property to her sister Sudie. The evidence further tended to show that the sisters, Elizabeth and Sudie, lived together, by themselves, until the death of Elizabeth, and thereafter the testatrix, Sudie Hargrove, lived alone until the time of her death. The plaintiffs are heirs at law of George W. Hargrove.

Approximately one hundred witnesses testified at the trial. The caveators offered approximately forty-three witnesses, and the propounders approximately fifty-eight witnesses. The testimony of these witnesses in many instances is totally irreconcilable. Many of the witnesses for the caveators testified that Sudie Hargrove had been crazy for many years and did not have sufficient mental capacity to make a will. The witnesses for the propounder testified that she was a college graduate, had been a school teacher, was an unusually bright and cultured woman, and several deeds and conveyances of land and timber were offered in evidence, which had been made and executed by the testatrix since the date of the will.

Four issues were submitted to the jury and two of them were answered by consent; that is, that the paper-writing was duly executed and that the caveators are the nephews and next of kin and heirs at law of Sudie Hargrove. The third and fourth issues were answered by the jury in the negative; that is, the jury found that the testatrix did not have sufficient mental capacity to execute a will, and that the paper-writing propounded for probate was not her last will and testament.

From judgment upon the verdict the propounders appealed.

Butler & Butler for propounders.

J. Faison Thomson and Hugh Brown Campbell for caveators.

N. W. Outlaw of counsel.

IN RE WILL OF HARGROVE.

BROGDEN, J. George W. Hargrove, the brother of testatrix, and father of the caveators, left his home in Sampson County, North Carolina, in 1877, or 1879, and went to Texas. The caveators introduced in evidence over the objection of the propounders an affidavit purporting to have been made by George W. Hargrove, and recorded in Deed Book U-2, pp. 579 and 80, of the public records of the clerk of the county court of Lamar County, Texas. This affidavit is as follows: "State of Texas—county of Lamar County, Texas. Know all men by these presents: That I, G. W. Hargrove, now residence in said county and state, the said G. W. Hargrove, being a son of Benjamin Hargrove of the State of North Carolina and County of Sampson, the said Benjamin Hargrove being deceased, his property being proportioned amongst his heirs, to wit: John A. Hargrove, William H. Hargrove, George W. Hargrove, Elizabeth J. Hargrove, and Susan H. Hargrove in the prorata of said property each of the heirs were perfectly satisfied with their part of said property, the said G. W. Hargrove, did bargain, sell and convey to said Elizabeth J. Hargrove his interest in said estate through Judge A. A. McCoy him the said judge having a power of attorney to settle off all debts that had accrued against said G. W. H. the amount of such was $1,000, one thousand dollars the said A. A. McCoy by my consent the said G. W. H. sell and convey to said Elizabeth J. Hargrove 430 acres of land in said county and State of N. C. situate 10 miles east of the county side and also where the Wilmington and Raleigh Co. roads cross the Goldsboro and Clinton Co. R. the boundaries of said land on the south the Goldsboro and Clinton R., on the east it extends to the six runs Chappel on the north B. S. H. Hargrove line on the west by a creek known as the Six Runs conditions of sale of said property, to wit: The said G. W. H. sold this said property to said E. J. H. for the sum of $2,600, twenty-six hundred dollars, whereas as $1,000 was cash and the remainder $1600 sixteen hundred in three notes, to wit: One for $900.00, one $500.00 and one $200.00, all three of notes were given payable on day after date with interest from date at 6 per cent these notes were given 20 December, 1879, in the city of Memphis, Tenn., whereas, said E. J. Hargrove has held said notes until 1 December, 1884, when the said G. W. H. such said notes to said E. J. H. Said notes retain liens on said property until paid. She E. J. H. states that the notes never reached their destine therefore I make this statement in case I should die before the matter is fixed up. Whereas, I, the said G. W. Hargrove, married George Ann the daughter of E. C. Allen of the State of Texas and county of Lamar and the said G. A. H. as being my lawful and weded wife becomes heir to said property at my death and if I should die before this matter is settled the undersigned

one will administer on my estate and pay to said as now Mrs. G. A. Hargrove the same this 2 April, 1885. G. W. Hargrove."

The caveators further offered in evidence the power of attorney, executed by G. W. Hargrove on 25 January, 1879, and recorded in Book 46, page 33, of the public record of Sampson County.

After the affidavit had been offered in evidence and on the second day of the trial, the court instructed the jury as follows: "The court charges you that these portions of the deposition referring to the evidence and referring to the paper-writing, purporting to be a marriage license, and these exhibits attached to the deposition, marked Exhibits "A" and "B," are to be considered by you, if at all, to show the blood kinship between the caveators and the deceased, Miss Sudie Hargrove, if these paper-writings and evidences of paper-writings do tend to show. "Other than for the above purposes, the evidence of the paper-writings are withdrawn from the consideration of the jury."

From the foregoing ruling of the court the question arises: Was the evidence competent?

Obviously, it was not a declaration against interest, as interpreted by many decisions of this Court. *Ins. Co. v. R. R.,* 195 N. C., 693, 143 S. E., 516. Moreover, the kinship of the caveators to the testatrix was not seriously controverted at the trial. The caveat alleged that Sudie Hargrove left surviving her "as her only heirs at law and distributees two nephews, E. C. Hargrove and B. F. Hargrove; that the said paper-writing purporting to be the last will and testament of Sudie Hargrove, devised all of her property, as appears in Exhibit "A" of paragraph 1 of this caveat." Answering paragraph 3, the propounders said: "The respondents are not advised who are the only heirs at law and distributees of Sudie Hargrove, deceased, otherwise article 3 is admitted." As we interpret the pleadings, there was no express denial that the caveators were not the nephews of the deceased, but it was not admitted that the caveators were the "only heirs at law and distributees of deceased." An issue was framed as to whether the caveators were the nephews and next of kin and heirs at law of Sudie Hargrove, but the record discloses that this issue was answered by consent. However, if it be conceded that such an issue was material, the next inquiry to be determined is whether the affidavit was competent to prove pedigree or blood relationship. The rule of law was clearly expressed in *Jelser v. White,* 183 N. C., 126, 110 S. E., 849, as follows: "Elementary principles in the law of evidence exclude declarations as to pedigree unless it can fairly be assumed that the declarant is disinterested. Hence, it must affirmatively appear that the statement was made *ante litem motam;* and this expression is not restricted to the time of bringing suit, but is referred to the beginning of the controversy." The substance of the affidavit is

that George W. Hargrove, father of caveator, had not been paid for his share in his father's estate, and that his interest in the estate subsisted. Manifestly, the evidence discloses upon its face that the declarant was interested in the estate of his father, and the paper-writing was executed and recorded for the express purpose of preserving the evidence of the controversy. Furthermore, the caveators are not named in the affidavit and the paper-writing expressly declared that the wife of the declarant "as being my lawful and weded wife, becomes heir to said property at my death, and if I should die before this matter is settled, the undersigned one will administer on my estate and pay to said as now Mrs. G. A. Hargrove the same." Indeed, the affidavit was wholly hearsay of the clearest type, and had no bearing whatever upon the mental capacity of the testatrix, which was the only material subject of inquiry at the trial.

There are many other exceptions earnestly debated by counsel on both sides, but as a new trial must be awarded, the court deems it inadvisable to discuss these exceptions for the reason that it is wholly impossible to anticipate what evidence will be offered at the next trial, or whether the same exceptions will be presented in similar form.

New trial.

G. C. DENTON (HELEN B. DENTON, ADMINISTRATRIX OF G. C. DENTON, DECEASED), v. SHENANDOAH MILLING COMPANY, INCORPORATED, AND FIRST NATIONAL BANK OF HARRISONBURG, VIRGINIA.

(Filed 12 July, 1933.)

1. Bills and Notes B c—

The purchaser of a draft is one who acquires unconditional title thereto, with no agreement, expressed or implied, to charge the draft back if it is not paid, and the right to charge the draft back may be inferred from the course of dealing between the parties.

2. Same: Evidence K a—Testimony held incompetent as invading province of jury and as being mere conclusion of witness.

Where the determinative question in an action is whether the intervener is the purchaser of a draft or an agent for its collection, testimony of the intervener's agent that it was a purchaser is properly excluded as invading the province of the jury, and the facts relating to the intervener's acquisition of the paper not being in dispute, such testimony is also incompetent as being a mere conclusion of the witness.

3. Bills and Notes B c—

Where the evidence is conflicting as to whether a party is a purchaser of a draft or an agent for its collection the question is one for the jury, but where the evidence is susceptible of only one interpretation it is a question of law for the court.

4. Same—Evidence in this case held to show as matter of law that bank was collecting agent for draft and not purchaser thereof.

Where the uncontradicted evidence is to the effect that a customer of a bank daily sent the bank drafts containing a notation that they were not to be considered as a deposit but were to be accounted for upon collection to the customer, the drawer, that the bank credited the drawer's account therewith and allowed him to check thereon immediately, but customarily charged the drafts back to the drawer's account if they were not paid: *Held*, the evidence discloses as a matter of law that the bank was an agent for the collection of the drafts and not a purchaser thereof, and where the proceeds of some of the drafts have been attached by a creditor of the drawer, the bank may not successfully intervene and claim title thereto.

CIVIL ACTION, before *Cowper, Special Judge,* at Special December Term, 1932, of MECKLENBURG.

On 20 May, 1931, the Shenandoah Milling Company, Incorporated, drew a draft, as follows: "The First National Bank—68-155. Harrisonburg, Va. 20 May, 1931. At sight pay to the order of the First National Bank of Harrisonburg, Va., at Harrisonburg, Va.—$402.00—four hundred two and 00/100 dollars. Value received and charge to the account of Shenandoah Milling Company, Incorporated. By: F. I. Reim—To Goodwill Stores Deposit and Savings Bank, North Wilkesboro, N. C. Stamped on the back: Collection—Pay to the order of any bank or banker prior endorsement guaranteed 21 May, 1931. First National Bank, 68-155 Harrisonburg, Va.—68-155—Wm. H. Byrd, cashier." "This draft is a cash item and is not to be treated as a deposit. The funds obtained through its collection are to be accounted for to the drawer, and are not to be commingled with the other funds of collecting bank." On 29 May, 1931, the Shenandoah Milling Company drew the following draft: "The First National Bank—68-155. Harrisonburg, Va. 29 May, 1931. At sight pay to the order of the First National Bank of Harrisonburg at Harrisonburg, Va.—$1,008.24—one thousand eight and 24/100 dollars—Value received and charge to the account of Shenandoah Milling Company, Incorporated. By F. I. Reim—To Cash and Carry Stores—Elkin National Bank, Elkin, N. C. Stamped on back: Collection—pay to the order of any bank or banker—prior endorsements guaranteed—1 June, 1931—First National Bank, 68-155 Harrisonburg, Va.—68-155—Wm. H. Byrd, cashier." "This draft is a cash item, and is not to be treated as a deposit. The funds obtained through its collection are to be accounted for to the drawer, and are not to be commingled with the other funds of collecting bank."

The Goodwill Store paid the $402.00 draft, and before the proceeds were remitted, the plaintiff, G. C. Denton, claiming to be a creditor of Shenandoah Milling Company, sued out an attachment against said Milling Company and levied upon said sum of money. In like manner

the Cash and Carry Feed Stores draft, amounting to $1,008.24, was paid to the Elkin National Bank and was attached by the plaintiff. The First National Bank of Harrisonburg, Virginia, intervened, claiming the proceeds of the draft by reason of the purchase of the same from the Shenandoah Milling Company. The cashier of the intervening bank testified that the bank acquired possession of these drafts "by purchase from the Shenandoah Milling Company, Incorporated. The Shenandoah Milling Company, Incorporated, is a customer of our bank and it maintains an account with us at all times. It is true that we have acquired a number of other drafts from the Shenandoah Milling Company, Incorporated, in the course of its business relationship. We get drafts from them practically daily. When those drafts are forwarded to us they are placed to the credit of Shenandoah Milling Company and are forwarded to the respective places for collection. They are, of course, endorsed to us. In the case here in question, there was a bill of lading attached to each of the drafts. The amount of those drafts was for the purchase price of flour, and the bills of lading evidencing the ownership of the flour were attached to the drafts. The drafts were endorsed to us and the amount thereof was credited to the Shenandoah Milling Company. We forwarded the drafts to the respective banks of North Carolina for presentation to the drawee. . . . The place of business of Shenandoah Milling Company is approximately twenty-five miles from our bank. They have been doing business with our banks . . . for a period longer than ten years. I do not think I would have a right to say approximately, about how much cash balance they carry, usually with us, or what is their average daily balance, other than to say that they maintain a satisfactory account with us. Their deposit of drafts for collection with our bank is a matter of practically daily occurrence. These drafts are usually credited to their account; and they are permitted to draw on the proceeds of these drafts without any further question." In answer to questions propounded on cross-examination with reference to the course of dealing between the Milling Company and the bank, in the event the drafts were unpaid, the witness said: "In a case similar to this one, it is necessary for us to communicate with the Shenandoah Milling Company, Incorporated, and make some arrangements regarding the carrying of the item until such time as it is taken care of. (Q.) Suppose, Mr. Byrd, a draft is definitely unpaid and refused, what is the course of the bank? Do they charge that draft back to the account of the Shenandoah Milling Company? (A.) Yes, sir, and return the bill of lading covering the security for the draft to the Shenandoah Milling Company, Incorporated, together with the draft." In response to another question as to who would bear the expense of litigation, the witness said: "We hope for it to be paid by the Shenandoah Milling Company."

The treasurer of the Milling Company testified that "our custom in our handling of drafts of this sort in our dealings with the First National Bank is that we mail them to the bank and they give us credit for them. They notify us the next day of the receipt of the draft. . . . We drew against that credit given us without waiting to hear anything from the North Carolina bank. . . . It is almost a daily occurrence for our company to deposit for collection drafts which are credited to the company's account in Mr. Byrd's bank and then checked on. . . . In case a draft comes back uncollected in regard to our account, as a rule we ask the bank to get the draft and the bill of lading back. The amount of this draft is customarily either charged back to our account or we give them a check for it. I meant by that last answer that there are times when our balance on deposit at bank is not sufficient to take care of a draft that we have transferred to them. If all the drafts we have outstanding were returned today, Mr. Byrd would be after us in a very few minutes."

The plaintiff offered no evidence, and at the conclusion of the evidence for the intervener the trial judge, being of the opinion that the bank had no interest in either of the drafts, ordered and adjudged that the plaintiff was entitled to recover the proceeds thereof. From such judgment the intervener appealed.

Samuel R. McClurd and Tillett, Tillett & Kennedy for plaintiff.

Hunton, Williams, Anderson, Gay & Moore, E. R. Preston, H. Haywood Robbins, Jr., T. Justin Moore and Stephen H. Simms for intervener.

BROGDEN, J. Was there sufficient evidence to be submitted to the jury as to whether the intervening bank was a purchaser and owner of the drafts in controversy?

The general rule recognized and adopted by the majority of the American courts, and which prevails in this jurisdiction is "that if a bank discounts a paper and places the amount less the discount to the credit of the endorser with the right to check on it and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the endorsement, the bank is an agent for collection and not a purchaser." By inverting the proposition, it is clear that in cases of this type, a purchaser of the draft is one who acquires the unconditional title thereto, with no agreement, express or implied, to charge the paper back if it is not paid. This Court and others generally have declared that an implied agreement to charge back may be inferred from a relevant course of dealing between the parties. Consequently, the first inquiry is whether the intervener purchased the instrument.

The cashier of the intervening bank testified that his bank purchased the draft and owned it at the time the suit was instituted. This testimony was excluded, apparently upon the theory that the purchase and ownership of the draft were the identical questions to be determined by the jury. Such ruling upon the facts disclosed, was correct. *Marshall v. Telephone Co.,* 181 N. C., 292, 106 S. E., 818; *Temple v. LaBerge,* 184 N. C., 252, 114 S. E., 166; *Trust Co. v. Store Co.,* 193 N. C., 122, 136 S. E., 289. Furthermore, the facts relating to the acquisition of the paper are not in dispute. Hence the excluded testimony was no more than the conclusion of the witness. *Temple v. LaBerge, supra.*

The line of judicial thought in this State, determining whether a bank is a purchaser or collecting agent, is composed of two branches. One branch is made up of those cases in which the evidence is conflicting, equivocal and contradictory. In such event an appropriate issue must be submitted to a jury. See *Worth v. Feed Co.,* 172 N. C., 335, 90 S. E., 295; *Sterling Mills v. Milling Co.,* 184 N. C., 461, 114 S. E., 756; *Bank v. Monroe,* 188 N. C., 446, 124 S. E., 741. The other branch is composed of cases in which the evidence in its entirety seems susceptible of only one construction, interpretation or conclusion. In such event the question as to whether the bank is a purchaser becomes one of law and governed by the instruction of the trial judge. *Temple v. LaBerge,* 184 N. C., 252. Therefore, the solution of the case at bar depends upon whether the evidence liberally interpreted classifies the action as belonging to the line represented by *Temple v. LaBerge, supra,* or the line represented by *Bank v. Monroe, supra.* Hence, it is necessary to examine the evidence. At the outset, it is to be noted that the intervening bank was the payee specified in both instruments, and each of said drafts contained upon its face the notation that it was "not to be treated as a deposit. The funds obtained through its collection are to be accounted for to the drawer," etc. The drawer was the Shenandoah Milling Company.

The cashier of the bank testified expressly that if the drafts were refused and unpaid that they would be charged back to the account of the Shenandoah Milling Company, the bill of lading and the draft being returned to said company. The treasurer of the Milling Company said that "in case the draft comes back uncollected in regard to our account, as a rule, we ask the bank to get the draft and bill of lading back. The amount of this draft is customarily either charged back to our account or we give them a check for it."

The court is of the opinion that the undisputed evidence classifies the case within the principle announced in *Temple v. LaBerge, supra,* and hence the ruling of the trial judge was correct.

Affirmed.

WILLIAM FARR ET AL. V. CITY OF ASHEVILLE.

(Filed 12 July, 1933.)

Municipal Corporations F d—Evidence held insufficient to show appropriation by city of water mains installed by plaintiff.

Evidence that the owner of a subdivision outside the corporate limits of a city constructed water mains therein, and for his own convenience and profit connected them with the city's water system, and that the city furnished water through such mains to the residents of the development, collecting water rentals from the residents, and that thereafter the corporate limits of the city were extended to include the development, and that the city continued to furnish water to the residents of the development in the same manner as before the extension and without any assertion of ownership of the mains installed by plaintiff, *is held* insufficient to show a taking or appropriation of the plaintiff's mains, and the city's motion as of nonsuit in the owner's action to recover the value of such mains should have been allowed, and the fact that the city repaired a leak in such mains and flushed them at a dead-end does not alter this result, such acts being incidental to the furnishing of water, nor does the connection of water lines outside the development with such mains after the extension of the city limits constitute an appropriation of plaintiff's property by the city.

CIVIL ACTION, before *Clement, J.*, at October Term, 1932, of BUNCOMBE.

The plaintiffs instituted this action against the defendant alleging that they bought a certain block of property outside the corporate limits of Asheville, and "that during the latter part of 1923 and the first part of 1924 the plaintiffs, being desirous of developing said tract of land into residential property, had the same surveyed and platted into lots, streets, alleys and sidewalks, and proceeded to develop the same and to build upon said property improved, hard-surfaced streets, alleys and sidewalks, and built and constructed a water and sewer system . . . in accordance with the ordinances of the city of Asheville." It was further alleged that pursuant to chapter 205, Private Laws of 1929, the corporate limits of the city of Asheville were extended "so as to include the aforesaid development made by these plaintiffs, and the city of Asheville did on or about 30 June, 1929, in pursuance of the authority of said act, take charge and control of said sewer and water systems, and made same a part of the said water and sewer systems of the city of Asheville, . . . using the same for its own uses and purposes, and that by such taking and using the defendant, by virtue of the implied promise and agreement to pay plaintiffs for said water and sewer mains, became indebted to the plaintiffs in the amount of the value thereof." Plaintiffs further alleged that they had installed

a water system in said development at a cost of $2,405.72 and prayed that they recover from the city the value of said water system.

The evidence tended to show that the block of land owned by the plaintiffs lay between Merrimon and Westall avenues. The plaintiffs opened up a street running east and west from Merrimon Avenue to Westall Avenue and named this street Farrwood Avenue. Streets were also opened entering Farrwood Avenue and designated as Vineyard Place and Garden Terrace. The subdivision contained forty-one lots and all of the lots had been sold.

The city maintained a water line on Merrimon Avenue, and the plaintiff connected his water system with the line on said Avenue and constructed a line along Farrwood Avenue eastwardly to Kimberly Avenue, which was about four hundred feet beyond the boundaries of plaintiffs' subdivision. The Kimberly Avenue property was owned by Dr. Grove, and the city was furnishing water to the Grove property. The pipes were laid in 1923 and 1924. Hydrants and water connection were installed so as to furnish water to each lot in the Farrwood subdivision. The system was not installed under the supervision or superintendence of any city inspector. Plaintiff Farr said: "The city was furnishing water through the lines prior to 1929 and at that time the property was out of the city. I never made any claim of any kind up to 1929 or until after the Stephens' suit in Charlotte. Prior to 30 June, 1929, when the city limits were extended, the water rate outside the city limits was twice as large as that within said limits." The superintendent of the water department in the city of Asheville, a witness for plaintiffs, said: "The city furnished water in 1923 and in 1924 over these same lines and collected water rents. There has been no change in the method of handling it since then; it was handled in 1929 just as it was done prior to 1929." A former plumbing inspector of the city of Asheville, witness for plaintiffs, said: "He was employed by the city of Asheville from 15 December, 1900, to 31 July, 1931. . . . My duty was to maintain the water and sewer systems of the city and install such lines as were ordered by the commissioners. I am familiar with the Farrwood development. During my employment I remedied a leak on Farrwood near Vineyard. I flushed the hydrant on Vineyard frequently, the dead-end, because one of the houses is quite close to the dead-end. I extended the Virginia Avenue water line and connected it to Farrwood, after the city extension. . . . The leak was repaired several years ago. Virginia Avenue is in Norwood Park. The connection was made on Farrwood Avenue, east of Westall Avenue. Farrwood Avenue goes beyond Westall Avenue east into Kimberly. . . . The only connection I made was on Farrwood, east of Westall, about two hundred or two hundred and fifty feet from Kimberly." There was

further testimony to the effect that "the lots were appraised during the development at a price which included the value of the improvement. The lots would not have been worth nearly as much had they not been improved." There was also evidence tending to show that the water system was reasonably worth the amount paid by the plaintiff in constructing the same.

The following issues were submitted to the jury:

1. "Did the plaintiffs install and pay for the water mains located in said development, and were they the owners of the same on 30 June, 1929, as alleged in the complaint?"

2. "Did the defendant on and after 30 June, 1929, wrongfully take possession of said water main and appropriate the same to its own use?"

3. "What was the just and reasonable value of said water mains on 30 June, 1929?"

4. "Is the defendant indebted to the plaintiff by reason of the taking of the said water mains, and, if so, in what amount?"

The jury answered the first issue "Yes," the second issue "Yes," the third issue "$1,400," and the fourth issue "$1,400."

From judgment upon the verdict defendant appealed.

John H. Cathey and Ford, Coxe & Carter for plaintiffs.
J. G. Merrimon for defendant.

BROGDEN, J. Was there evidence that the defendant did "on and after 30 June, 1929, wrongfully take possession of said water main and appropriate the same to its own use?"

The facts relied upon by the plaintiff to show wrongful taking and appropriation are as follows:

(a) The extension of the limits of the city of Asheville in June, 1929, thus incorporating the water system into the general system of the city.

(b) The repairing of a leak on Farrwood Avenue near Vineyard Street.

(c) The flushing of a hydrant at a dead-end on Vineyard Street by the city plumber.

(d) The extension of the Virginia Avenue water line and connection thereof to the Farrwood line after city extension.

Manifestly, the bare extension of the city limits did not amount to a wrongful taking or appropriation of plaintiffs' property. The city owned a water line on the western boundary of the development, and also another line on Kimberly Avenue, which is east of the Farrwood development. The Farrwood construction was made in 1923 or 1924, and the city began furnishing water through the pipes claimed by the

plaintiffs and collected water rentals from users within the area. The repairing of a leak and the flushing of a dead-end was incident to furnishing water. Indeed a witness for plaintiffs said that there has been no change in the method of furnishing water since the installation of the system. "It was handled in 1929 just as it was done prior to 1929." Neither does the fact that a connection was made to the Farrwood Avenue line outside the development constitute a wrongful appropriation of plaintiffs' property. In the last analysis the plaintiff built a private water system, and for his own convenience and profit, connected it with the city system on the east and west of his development. The city immediately began to furnish water to residents in the subdivision on the completion of the system and has continued to do so up to the time the suit was brought on 3 February, 1932, without any change in its methods and without any assertion of ownership of the water pipes laid by the plaintiffs. Consequently, the court is of the opinion that there was no evidence of a wrongful taking or appropriation of plaintiffs' property within the definition of such terms. *Caveness v. R. R.*, 172 N. C., 305, 90 S. E., 244; *Powell v. R. R.*, 178 N. C., 243, 100 S. E., 424. Therefore, the motion for nonsuit should have been allowed.

Reversed.

W. A. CORBETT, TRADING AND DOING BUSINESS AS CORBETT PACKAGE COMPANY, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 July, 1933.)

1. Appeal and Error J c—

The findings of fact by the referee, supported by competent evidence and approved by the trial court, are conclusive on appeal where no error of law is committed on the hearing.

2. Carriers B b—Finding that shipper tendered correct charges and that freight came within specified classification held conclusive.

A railroad's deliberate and peremptory refusal to accept shipments properly tendered with the correct freight charges entitles the shipper to the penalties prescribed by C. S., 3515, and where in an action to recover the prescribed penalties the referee finds upon ample evidence in a hearing in which no error of law is committed, that the shipment came within a certain classification, and that the shipper tendered the correct amount for such classification, and the finding is approved by the trial court, such finding is conclusive on appeal, and the carrier may not successfully contend that the shipment came within another classification for which higher freight charges were prescribed, and where a higher tariff has been charged on one shipment the shipper is entitled to recover the excess paid.

3. Same—

C. S., 3515, providing a penalty for a carrier's refusal to receive and forward freight duly tendered with proper freight charges, is constitutional as applied to intrastate shipments.

4. Appeal and Error K g—

The force of a decision of the Supreme Court is not affected by lapse of time.

5. Carriers B b—Evidence held sufficient to support finding of actual damages arising from carrier's wrongful refusal of freight tendered.

Evidence that shipper's contract to deliver certain merchandise was canceled because of carrier's wrongful refusal to accept the merchandise for shipment *is held* sufficient to support the referee's finding of actual damages, profits which would have been certainly realized but for carrier's wrongful refusal of the shipment being recoverable under C. S., 3515.

6. Same—

Ambiguous tariffs are to be construed favorably to the shipper, and where two descriptions and tariffs are equally appropriate the shipper is entitled to the one specifying the lower rate.

APPEAL by defendant from *Devin, J.*, at December Term, 1932, of NEW HANOVER. From PENDER.

Civil action to recover (1) penalties in the aggregate sum of $3,750 for wrongful refusal to receive and transport freight duly tendered by plaintiff to defendant; (2) damages in the sum of $2,800 for cancellation of contract which plaintiff had with Castle Hayne Growers and Shippers Association alleged to have been brought about by defendant's wrongful act; and (3) freight overcharge in the sum of $57.45 on shipment actually transported.

A compulsory reference was ordered under the statute, which resulted in report and judgment for plaintiff in the amounts and for the causes above set out.

Defendant appeals, assigning errors.

Burney & McClelland and Bryan & Campbell for plaintiff.
Carr, Poisson & James and W. A. Townes for defendant.

STACY, C. J. While the record is voluminous and has entailed much study and investigation, the case really falls within a very narrow compass.

The questions presented are these:

1. Were the commodities, "wood splint or veneer boxes, fruit or berry inside carriers, s. u. nested," "vegetable hampers nested and wood splint or veneer boxes, fruit or berry inside carriers, s. u. nested," and "vegetable hampers nested," manufactured by plaintiff and duly tendered the

defendant for intrastate shipments, subject to *lumber rates* under note A, Item 66 of E. H. Dulaney, I. C. C. No. 21, exceptions to Southern Classification No. 47 as follows: "Wood, splint, or veneer boxes, fruit or berry (inside carriers), s. u. nested, or fruit or vegetable hampers, wood splint, s. u. nested, tops in bundles; straight or mixed, C. L. Min. Wt. 30,000 lbs. lumber rates?"

There is ample evidence to support the finding that the shipments tendered fall within the above classification and that the correct freight charges were duly proffered with said shipments. True, there is evidence to the contrary, but in view of the findings of the referee, which were approved by the judge, this evidence may be put aside on appeal as no longer essential or material to the controversy.

In reference cases, the findings of fact, approved or made by the judge of the Superior Court, if supported by any competent evidence, are not subject to review on appeal, unless some error of law has been committed in the hearing of the cause. *Wallace v. Benner,* 200 N. C., 124, 156 S. E., 795; *Robinson v. Johnson,* 174 N. C., 232, 93 S. E., 743.

Speaking to the subject in *Thompson v. Smith,* 156 N. C., 345, 72 S. E., 379, *Walker, J.,* delivering the opinion of the Court, and pointing out the difference between the duties of the trial court and the appellate court in dealing with exceptions to reports of referees, said:

"We have said that where the evidence has been considered by the referee and by the judge, upon exceptions to the referee's findings, we will not review the judge's conclusions as to them, because the appellant has had two chances, and when two minds—one at least, and perhaps both, professionally trained and accustomed to weigh evidence and to compare and balance probabilities as to its weight—arrive at the same conclusion, there is a strong presumption in favor of its correctness, or the same is true, even when the judge differs from the referee as to his findings, and we may safely rely on its correctness. The referee is selected, in such cases, in place of a jury, and the judge so acts when he reviews the referee. If there is any evidence to support the findings and no error has been committed in receiving or rejecting testimony, and no other question of law is raised with respect to the findings, we accept what the judge has found as final, as we do in the case of a jury."

Defendant's refusal to accept the shipments tendered by plaintiff was deliberate and peremptory, thus entitling the plaintiff to the penalties prescribed by the statute, if it be constitutional.

2. Is C. S., 3515, which provides a penalty of $50.00 for each day that any railroad or other transportation company shall refuse to receive and forward freight duly tendered with proper freight charges under existing tariffs constitutional?

It is said in defendant's brief that this section has been upheld in a number of cases, "but apparently has not been considered or passed upon for a period of nearly seventeen years." If the time of the decision be regarded as capitally important, it may be observed that the cognate statute, C. S., 3516, which gives a penalty for failure to transport a shipment within a reasonable time, has been upheld within the last three years. *Talley v. R. R.,* 198 N. C., 492, 152 S. E., 390. But we are not aware of any statute of limitation which bars the effect of a decision as a precedent. Perhaps the defendant wishes to see how the matter will strike the Court at the present time. Our answer is, that the statute is constitutional as applied to intrastate commerce. *Twitty v. R. R.,* 141 N. C., 355, 53 S. E., 957; *Garrison v. R. R.,* 150 N. C., 575, 64 S. E., 578; *Lumber Co. v. R. R.,* 152 N. C., 70, 67 S. E., 167. We are not now concerned with its applicability or nonapplicability to interstate shipments. *So. Ry. Co. v. Reid,* 222 U. S., 424.

3. Is there evidence to support the finding of actual damages arising out of the cancellation of the contract had between plaintiff and the Castle Hayne Fruit Growers and Shippers Association?

The answer is, Yes. Plaintiff had a contract to deliver to said association from 70,000 to 100,000 hampers which was canceled because the defendant refused to transport by freight the hampers tendered by plaintiff. C. S., 3515, in terms gives the right to recover actual damages, as well as penalties, for the wrongful refusal to receive and forward freight properly tendered. Profits which would certainly have been realized but for defendant's fault are recoverable as damages for wrongful breach of contract. *Nance v. Tel. Co.,* 177 N. C., 313, 98 S. E., 838; *Brewington v. Laughran,* 183 N. C., 558.

4. Is there any evidence to support the finding that plaintiff is entitled to recover the overcharge of $57.45 on the shipment actually transported?

It is conceded that if the lumber rates were applicable to the shipment in question, as has heretofore been ruled they were, the instant point is no longer debatable.

The case in brief is this: Plaintiff was engaged in the manufacture and sale of "berry crates" and "vegetable hampers," used extensively by truckers for shipping berries and vegetables. A number of shipments were tendered the defendant at Atkinson, N. C., plaintiff's principal place of business, for transportation and delivery to customers in different localities throughout the trucking section of the State. These, the defendant declined to receive because the proper freight charges had not been tendered with said shipments. Plaintiff contended that under the published tariffs the shipments came under the classification which called for lumber rates and tendered such rates. The defendant, on the other hand, contended that a different and higher rate was applicable

to said shipments. Both parties had the benefit of legal counsel and expert advice. The defendant elected to stand upon its interpretation of the tariffs and declined the shipments in the face of the penalty statute, and the decisions which hold (1) that ambiguous tariffs are to be construed favorably to shippers (*So. Pac. Co. v. Lathrop,* 15 Fed. (2d), 486); and (2) that where two descriptions and tariffs are equally appropriate, the shipper is entitled to the one specifying the lower rate. *U. S. v. Gulf Ref. Co.,* 268 U. S., 542. The defendant, therefore, is in no position to complain if it must pay for an error in judgment deliberately made.

Affirmed.

A. GARLAND JONAS AND WIFE, ALEXANDRA L. JONAS, v. HOME MORTGAGE COMPANY ET AL.

(Filed 12 July, 1933.)

1. Usury A a—In determining whether contract is usurious the courts will look to its substance and not its form.

In determining whether a contract is usurious the courts will look to the substance of the transaction and not its form, and in this case the fact that the sum borrowed was made payable to the borrowers and an attorney with allegations and evidence that the attorney under instructions from the lender deducted a certain sum therefrom before the borrowers could obtain the money, together with the "item of expense" set out in the deed of trust securing the loan, *is held* sufficient to have been submitted to the jury on the question of usury.

2. Mortgages H b: Usury C c—In suit to restrain foreclosure for usury plaintiff must pay principal of debt plus six per cent interest.

Where plaintiff seeks to restrain the exercise of the power of sale contained in a deed of trust on the ground of usury he is required to pay the amount borrowed plus six per cent interest, and in such action he may not recover the statutory penalty for usury, the action being equitable in its nature, and where in an action to restrain the sale of the lands the deed of trust is canceled under order of court upon plaintiff's payment of a designated sum and the filing of a bond to secure the payment of any amount adjudged to be due over and above the amount paid, and plaintiff seeks to recover from the lender for usury and it appears from a careful calculation that the sum paid does not exceed the amount actually received by plaintiff plus six per cent interest, a directed verdict that plaintiff recover nothing of the borrower will be upheld on appeal.

APPEAL by plaintiffs from *Schenck, J.,* at November Term, 1932, of CALDWELL. No error.

On 6 July, 1932, the plaintiffs instituted suit against the defendants for the purpose of restraining a sale of the plaintiffs' land under power

conferred by a deed of trust executed by the plaintiffs dated 15 August, 1927, to secure an indebtedness of $7,000 on the grounds of usury. The plaintiffs in their complaint asked for an accounting and for the recovery of the penalties prescribed by C. S., 2306. A temporary restraining order was issued enjoining the defendants from exercising the power of sale contained in the aforementioned deed of trust.

On the hearing of the temporary restraining order on 22 July, 1932, Judge Schenck, issued an order providing for the payment by the plaintiffs, within ten days from the date of the order, of the sum of $3,500 into the office of the clerk of the Superior Court of Caldwell County, to be paid by said clerk to the defendants or their assignee upon the production of the note secured by the deed of trust mentioned in the pleadings and the crediting of said amount on said note. The order was not complied with and the restraining order was dissolved.

The plaintiffs tendered, on 13 August, 1932, to the defendants a certified check in the sum of $5,174.38 in full satisfaction of the indebtedness due by the plaintiffs to the defendants, which check was not accepted, as the defendants stated that it was insufficient to satisfy in full the indebtedness. The defendants thereupon again advertised the land for sale on 8 September, 1932.

On 2 September, 1932, the plaintiffs obtained an order signed by Judge Schenck, requiring the defendants to show cause why they should not be restrained from conducting the sale advertised for 8 September, 1932. On 13 September, 1932, the hearing on the order to show cause was heard before Judge Schenck, and an order was entered requiring the plaintiffs on or before 17 September, 1932, to pay into the office of the clerk of the Superior Court of Caldwell County the sum of $5,174.38, to be paid by said clerk to the Fidelity Bank of Durham, North Carolina, trustee, or its agent, upon the production of the note referred to in the pleadings and the crediting of said sum on said note. This order further provided that the plaintiffs should file a bond with sureties acceptable to the clerk in the amount of $1,000, to be void on condition that the plaintiffs pay to the defendants the amount that might be determined to be due and owing by the plaintiffs to the defendants over and above the said amount of $5,174.38, and that upon the plaintiffs' compliance with the provisions of the order, the trustee in the deed of trust, should cancel said deed of trust. The order was complied with and the deed of trust canceled.

The cause came on for trial and the following issue was joined by the plaintiffs and the defendants:

"In what sum, if any, are the defendants indebted to the plaintiffs?"

The court charges you that as a matter of law if you find the facts to be in this case as shown from all the evidence in it, you will answer the issue "Nothing."

The jury answered "Nothing," according to the court's instruction. Judgment was rendered on the verdict. Plaintiffs excepted and assigned error to the charge of the court below and appealed to the Supreme Court. The necessary facts will be stated in the opinion.

Mark Squires and L. H. Hall for plaintiffs.
W. A. Devin, Jr., and Fuller, Reade & Fuller for defendants.

CLARKSON, J. The question involved: Was the lower court justified in directing a verdict that the plaintiffs recover nothing of the defendants? We think so.

This is an action in a court of equity, brought by plaintiffs to restrain defendants from selling their land under a deed of trust. *Miller v. Dunn,* 188 N. C., 397; *Ripple v. Mortgage Corp.,* 193 N. C., 422; *Pugh v. Scarboro,* 200 N. C., 59; *Clark v. Hood System,* 200 N. C., 635.

Plaintiffs borrowed $7,000, made note and bond payable to bearer with 6% interest, on 15 August, 1927, and secured same by deed of trust on certain real estate. The plaintiffs made 36 payments of $80.50, beginning with 14 September, 1927, and ending with 15 November, 1930.

Interest at 6% counted from 15 August, 1927, on $7,000 to 14 September, 1927, and credit of $80.50 so calculated on new principal, and $80.50 credited to 15 November, 1930. Then the balance on principal counted to 17 September, 1932, and credit of $5,174.38 and on balance interest calculated to date of judgment, 8 December, 1932. From a careful calculation, we think plaintiffs are not entitled to recover. See *Bledsoe v. Nixon,* 69 N. C., 89.

Plaintiffs further contend that they borrowed $7,000 and only received $6,650. That the draft was payable to A. Garland Jonas, Alexandria L. Jonas and Thomas P. Pruett, attorney. That the check was made by the Home Mortgage Company as a subterfuge in an attempt to evade the usury law. Plaintiffs in their complaint allege that "although the instrument aforesaid is recited to be security to the sum of seven thousand ($7,000) dollars, in truth and in fact the defendants received from the plaintiffs about $6,650 and the remainder as set forth in said instrument was knowingly reserved, charged, collected and paid defendants by plaintiffs as usurious charges for interest, principal and incidental expenses connected therewith, as will more fully appear by reference to said deed of trust so recorded as aforesaid."

The fact that the name of Thomas P. Pruett, attorney, was put in the check and plaintiffs could not get the money without it being handled that way, and plaintiffs' testimony to the effect that the payment to him

was only $6,650, and other evidence, though circumstantial, is sufficient to have been submitted to a jury, as to the usury on this aspect of the case. From a careful reading of the deed of trust its "Items of expense" in the deed of trust is strongly indicative of usurious evasion.

In *Bank v. Wysong,* 177 N. C., 380, 388, is the following: "This kind of usurious agreement has been cast in various forms, but the courts have invariably stripped it of its flimsy disguise, and decided according to its substance and its necessary tendency and effect, when the purpose and intent of the lender are unmistakable. And this is the correct rule."

In this kind of action to restrain a sale, equitable in its nature, the actual money loaned with 6% interest is all that the lender can recover. The $350.00 deduction, its purpose must be inquired into. *Trust Co. v. Redwine,* 204 N. C., 125; *Dixon v. Smith,* 204 N. C., 480.

It is well settled that the penalty for usury, C. S., 2306, is not applicable in this injunction proceeding—equitable in its nature. The principle is that he who seeks equity must do equity. In *Waters v. Garris,* 188 N. C., 305, 308, speaking to the subject: "It is the established law of this jurisdiction, that when a debtor, who has given a mortgage to secure the payment of a loan, comes into equity, seeking to restrain a threatening foreclosure under the power of sale in his mortgage, as a deliverance from the exaction of usury, he will be granted relief and allowed to have the usurious charges eliminated from his debt only upon payment or tendering the principal sum with interest at the legal rate, the only forfeiture which he may thus enforce being the excess of the legal rate of interest." *Miller v. Dunn,* 188 N. C., 397; *Ripple v. Mortgage Corp.,* 193 N. C., 422; *Pugh v. Scarboro,* 200 N. C., 59; *Clark v. Hood System,* 200 N. C., 635. Chapter 35, Public Laws of N. C., Special Session, 1924, as amended by chapter 28, Public Laws of N. C., 1925, and other amendments, are made applicable to Caldwell County and to the counties of Buncombe, Madison, Yancey, Henderson, McDowell and Watauga. Plaintiffs contend that these acts do not apply to the instant case. If they did, see *Plott v. Ferguson,* 202 N. C., 446.

But taking it for granted the jury would find that the $350.00 was usurious, yet from a careful calculation, plaintiffs would be entitled to recover nothing. We have had a competent expert to make these calculations for us. The defendants in their brief say: "Assuming that the plaintiffs received only the sum of $6,650, and applying each payment as of the date paid on accrued legal interest and reduction of principal, there would have remained due and owing by the plaintiffs to the defendants on 17 September, 1932, the date of the last payment, the amount of $261.26."

No error.

HAZEL BATSON v. CITY LAUNDRY COMPANY.

(Filed 12 July, 1933.)

1. **Master and Servant C b—Duty of employer to furnish reasonably safe means and appliances includes stairways and platforms.**

An employer must exercise ordinary care to provide employees reasonably safe means and appliances, including stairways and platforms necessary for their use in the performance of their duties, and evidence that steps of a stairway used by employees as a permanent part of their equipment had been allowed to become worn and slick, resulting in injury to an employee when she stepped on a slick place and fell, is held sufficient evidence to be submitted to the jury on the issue of the employer's negligence.

2. **Master and Servant C g—Evidence of employee's contributory negligence held sufficient to bar recovery as a matter of law.**

Evidence that a worker in a laundry was required to bring packages down a stairway in the building, that the number of packages carried at one trip was left exclusively to the employee, and that the employee was familiar with the condition of the stairway, and that she took a double armful of packages at one trip so that she was unable to see the steps immediately in front of her, and that she slipped and fell upon a slick place on a badly worn step *is held* to disclose contributory negligence barring a recovery as a matter of law, an employee being under duty to exercise reasonable care for his own safety.

CIVIL ACTION, before *Devin, J.,* at October Term, 1932, of NEW HANOVER.

The plaintiff was an employee of the defendant and instituted this suit to recover for personal injury sustained on or about 6 June, 1928. The defendant operates a laundry and there is a flight of steps from the first floor to the second floor of the building, consisting of about twenty-seven steps. The stairway is between two walls of the building, that is, the walls come up on each side or end of the steps. A witness for plaintiff said: "You could stand in the center of the steps and touch any side wall." The width of the tread of each step was from ten to twelve inches. The steps were constructed of boards an inch or an inch and a quarter in thickness. Plaintiff alleged and offered evidence tending to show that the edges of the steps were worn as a result of drawing hamper baskets of laundry up and down. The plaintiff detailed the facts and circumstances of her injury as follows: "On the afternoon of 6 June, I was sent up in the laundry room to bring down some packages to be delivered to the office, and in returning I was about midway of the steps, and I stepped in a slick worn place that caused my feet to slip from under me, and I stumbled two or three steps trying to regain my balance, and I saw that I was going head first, and I threw myself

back, grabbing at the wall to keep from falling, but there were no guard rails to grab by, and I was hurled on my back down on the steps, and I slid down lacking about two steps from the bottom, and there I was picked up by the bookkeeper and one of the drivers. There were no guard rails, nothing but the plastered wall on both sides, I am not much of a judge of distance, but I imagine the steps are between five and six feet wide. . . . The edges of the steps were worn off round and slick. I was going down kind of on the ball of my foot and it slipped out from under me. . . . I turned my ankle. . . . I put the packages on my arm and put the other over them to keep from losing them. If there had been a guard rail there I don't know which arm I would have used. . . . I carried the packages on my left arm. I said the other arm was on top. It was over them. Putting both arms over it would make a double armful. I guess I did say that I had a double armful. I had the packages in both arms. . . . I did say in order to prevent going several times I brought those many packages. What I meant I could have brought one down at a time and not as many as I did have. . . . I told Judge Barnhill at a former trial that I could not see where I was stepping. I meant I was not looking right down at the step I was stepping on. I could see the steps ahead of me, but was not particularly noticing the one I was stepping on after I left the top. I saw the way was clear. . . . I had never noticed any particular defect in the steps, nothing more than, I reckon, they were worn from going up and down them. I do not remember they were worn particularly by going up and down them. . . . I knew that there were no handrails on the stairs for three years before I was hurt." . . .

There was evidence that after the plaintiff was hurt on 6 June, 1928, that she continued to work at the laundry until 27 February, 1931. In August, after the plaintiff was injured in June, she took an automobile trip to Mississippi and the Gulf of Mexico. The evidence further tended to show that as a result of the fall a spinal trouble developed and on 28 February, 1931, the plaintiff was operated upon, and that she has sustained painful and permanent injury.

At the conclusion of plaintiff's evidence the trial judge sustained a motion of nonsuit, and the plaintiff appealed.

Herbert McClammy, Burney & McClelland and Rountree, Hackler & Rountree for plaintiff.

Bryan & Campbell and L. Clayton Grant for defendant.

BROGDEN, J. (1) What duty does an employer owe an employee with reference to steps or stairways used by employees in the due and proper discharge of their duties?

(2) Does the evidence warrant a judgment of nonsuit upon the ground of contributory negligence?

The construction and maintenance of steps, stairways and platforms, constituting a part of the permanent ways and appliances furnished by an employer to an employee, require the same degree of care upon the part of such employer; that is to say, that the employer must exercise ordinary care in providing reasonably safe ways and appliances for the use of the employee in discharging the duties imposed by the contract of employment. The testimony liberally interpreted, tends to show that the stairway was constantly used by the plaintiff and other employees as a part of the permanent ways and appliances of the laundry. See the following step cases: *Urquhart v. R. R.*, 156 N. C., 581, 72 S. E., 630; *Bohannon v. Stores Co.*, 197 N. C., 755, 150 S. E., 356; *Farrell v. Thomas and Howard Co.*, 204 N. C., 631. Moreover, there was evidence that the steps were "worn slick and rounded off at the edge. They were worn in the center of the tread, . . . they were worn right much." Plaintiff said: "I stepped in a slick worn place that caused my foot to slip from under me."

The foregoing evidence warranted an inference that the steps under all the circumstances were maintained in a negligent manner.

Notwithstanding, the conduct of the plaintiff must be measured by the same yardstick as that of the defendant. Therefore, the inquiry must shift to her. Did she exercise ordinary care for her own safety?

She knew the condition of the steps, because she had been using them for six years. She said: "I walked up them frequently. Sometimes I did not go more than once a day, and frequently two or three times. I knew there were no guard rails or banisters to the stairway." The evidence further discloses that plaintiff was descending a long flight of stairs with a double armful of packages. She selected the packages according to her own judgment or as she put it: "I guess that I was the judge of the turn. I was not given any instructions about it. They never did tell me how many to bring down. They did not tell me how to come down the steps." The double armful of packages, which the plaintiff was carrying, made it impossible for her to see the steps as she was descending. While she could see the steps ahead of her she was really placing her feet by guess. A liberal interpretation of plaintiff's testimony leads to the inevitable conclusion that at the time of her injury she was not exercising ordinary care for her own protection, and must, therefore, bear the consequences of her unfortunate injury.

The question of handrails or banisters was discussed in the briefs, but the absence of banisters does not appear to have had anything to do with the injury.

Affirmed.

TOWN OF FRANKLIN v. SAM L. FRANKS, H. W. CABE, W. C. CUNNINGHAM AND W. L. HIGDON.

(Filed 12 July, 1933.)

1. Limitation of Actions C a—

Payment on a note by the maker does not deprive an endorser thereon of the defense of the statute of limitations.

2. Limitation of Actions C c—Former fiduciary relationship of endorser held not to prevent him from pleading statute of limitations.

A commissioner of a town endorsed a negotiable note made payable to the town. The town brought suit thereon, but long before the commencement of the action the endorser had ceased to be a commissioner: *Held,* the fiduciary relationship formerly existing between the endorser and the town does not prevent the endorser from pleading the statute of limitations as a bar to a recovery against him.

3. Limitation of Actions C d—Evidence held not to establish agreement not to plead statute of limitations.

Although a party may be estopped from pleading the statute of limitations by an express agreement not to do so or by conduct rendering it inequitable for him to do so, the evidence in this case *is held* insufficient to establish as a matter of law an agreement by an endorser on the note sued on not to plead the statute, and an instruction to answer the limitation issue against the endorser is held for error.

CIVIL ACTION, before *Hill, Special Judge,* at November Term, 1932, of MACON.

On 15 July, 1925, Sam L. Franks executed and delivered to the town of Franklin his promissory note for the sum of $2,500. The note was endorsed by the defendants, H. W. Cabe, W. C. Cunningham and W. L. Higdon. The following entries appear on the back of the note, to wit: "2 December, 1930, paid $675.00. Interest paid to 15 January, 1931."

This action was instituted on 20 May, 1932. Sam L. Franks, the maker of the note, paid the interest and principal payment as aforesaid. The note was due 15 July, 1927, and the defendant Higdon was a member of the "town board at that time," but said defendant "went off the board the last of May, 1929." The attorney for plaintiff town testified: "About 2 December, 1930, we decided to collect the note and the whole bunch, Mr. Cabe, Mr. Cunningham and Mr. Higdon, and we couldn't decide on what was going to be done about Mr. Frank's note, and we finally agreed as well as I remember it was agreed among the whole bunch that if Sam L. Franks would make a payment on the note for a substantial part of it that we would let him go for a while and would not try to collect the rest of it. Mr. Higdon was not on the board at this

time." The evidence tended to show that the note was good at the time it was made. The attorney for the town further said that he "would not swear positively that W. L. Higdon said if Franks would pay $675.00 that he (Higdon) would stay on the note a certain length of time, but I will swear he said that he would remain liable if Mr. Franks would make a good payment." The town clerk said "that he notified all the sureties and the maker of the note, and Mr. Higdon said if Mr. Franks would pay up the interest on this note he was willing to sign it, and that there was no payment made after Mr. Higdon made the above statement."

The defendant, Higdon, pleaded the statute of limitations. The trial judge was of the opinion that it would not be equitable for the defendant to plead the three-year statute of limitations and instructed the jury to answer the limitation issue in the negative, and as the endorsement of the note was admitted, the judge further instructed the jury if they believed the evidence they would answer the issue of indebtedness $2,500 with interest.

From judgment upon the verdict the defendant Higdon appealed.

No counsel for plaintiff.
R. D. Sisk for defendant, Higdon.

BROGDEN, J. Payments made by the principal Franks did not deprive the endorser of the benefit of the defense of the bar of the statute of limitations. *Hauser v. Fayssoux,* 168 N. C., 1, 83 S. E., 692; *Barber v. Absher Co.,* 175 N. C., 602, 96 S. E., 43; McIntosh North Carolina Practice and Procedure, p. 127.

The theory of the plaintiff is that the defense of the bar of the statute of limitations was not available to the defendant for two reasons: First, that the defendant was a member of the board of aldermen or town commissioners at the time the note was executed and endorsed by him, and consequently it would be inequitable to plead the statute because he was occupying a fiduciary relationship toward the town. Second, that the defendant Higdon by virtue of an agreement, express or implied, had precluded the defense relied upon by him.

At the outset it must be noted that while Higdon was a member of the board of town commissioners at the time the note was executed that he "went off the board the last of May, 1929," and, therefore, was not a member of the board at the time the suit was brought in 1932. Consequently, any existing trust relationship with reference to the note had been terminated long before the institution of the action. The general rule is that a party may either by agreement or conduct estop himself

from pleading the statute of limitations as a defense to an obligation. McIntosh North Carolina Practice and Procedure, p. 122, section 130, summarizes the rule as follows: "To constitute such estoppel, there must be more than a mere delay or indulgence at the request of the debtor. There must be an express agreement not to plead the statute, or such conduct on the part of the debtor as would make it inequitable for him to do so." See *Lyon v. Lyon,* 43 N. C., 201; *Daniel v. Comrs.,* 74 N. C., 494; *Haymore v. Comrs.,* 85 N. C., 268; *Whitehurst v. Dey.* 90 N. C., 542; *Brown v. R. R.,* 147 N. C., 217, 60 S. E., 985.

In the *Dey case, supra,* it was intimated by the court that it would constitute a species of fraud for a person to actively request or cause a delay in asserting a cause of action and then plead the statute of limitations as a defense when the suit was brought. The court said: "No such fraudulent element is found in the facts of this transaction. The failure to sue was not in consequence of any request from the defendant, nor under any agreement making payment contingent or any undetermined future event, as an underlying condition requiring delay."

All the evidence tending to show an agreement, express or implied upon the part of Higdon not to plead the statute, is contained in three excerpts from the evidence, as follows: (a) Higdon said "that he would remain liable if Mr. Franks would make a good payment." (b) "The whole bunch agreed that if said L. Franks would make a payment on the note for a substantial part of it that we would let him go for a while and would not try to collect the rest of it." (c) Higdon said: "If Mr. Franks would pay up the interest on this note he was willing to sign it."

Mr. Higdon did not request a delay in bringing the action or lull the town to sleep by paliative and sedative promises of continued liability. The nearest approach to an agreement or request is found in the testimony that if Franks would pay "a substantial part" of the note "we would let him go for a while." It does not appear what the parties had in mind in using the expression "substantial part," nor does it appear what they had in mind by using the expression that they would let the maker "go for a while" and "would not try to collect the rest of it." These loose utterances and words of clouded meaning, are not sufficient in law to constitute an agreement, express or implied, to waive a valid defense to a negotiable instrument.

Reversed.

COMMERCIAL NATIONAL BANK v. CUTTER REALTY COMPANY.

(Filed 12 July, 1933.)

Pleadings C b—Item held to have arisen out of same contract between parties and should have been allowed as set-off.

The lessor took lessee's check to guarantee lessee's contract to rent a building to be constructed by lessor, and gave lessee a receipt stating that the sum should be returned upon execution of satisfactory bond or occupancy of the building. Before the building was complete the parties entered a supplemental agreement providing that extra improvements should be made and that lessee should pay the cost thereof over a stipulated sum. The lessee borrowed money from a bank and assigned as security the lessor's receipt. Lessor's claim against lessee for extra improvements exceeded the amount deposited by lessee under the original contract. The building was completed and paid for by lessor, and lessee took possession thereof. The bank, as assignee, sued lessor on the receipt, and denied lessor's right to plead the amount due by lessee for extra improvements as a set-off: *Held*, the lessor was entitled to plead by way of counterclaim the rights under the original lease and the supplemental agreement arising out of the same contract. As to whether the deposit created the relationship of debtor and creditor or pledgor and pledgee, *quære?*

APPEAL by defendant from *Warlick, J.*, at October Term, 1932, of MECKLENBURG.

Civil action by plaintiff, as assignee, to recover funds alleged to be held by defendant in trust, or pledge.

The facts are these:

1. On 28 November, 1928, the defendant contracted with Lucielle Shops, Incorporated, (hereafter called Shops for convenience) to erect and lease to Shops a building in the city of Charlotte at and for the yearly rental of $16,777.80, building to be ready for occupancy 1 March, 1929, subject to unavoidable delays.

2. That as "binder to guarantee carrying out lease," Shops deposited with defendant the sum of $3,000, taking receipt therefor as follows:

"Charlotte, N. C., 12 November, 1928.

"Received of the Lucielle Shops, Incorporated, check for three thousand dollars ($3,000) to be held by us as binder to guarantee your carrying out lease made between yourselves and the Cutter Realty Company, said lease being on store located at No. 3 N. Tryon Street, Charlotte, N. C., same to be returned when satisfactory bond is furnished or when you begin occupying store.

"Cutter Realty Company, by A. L. Parker, Treasurer."

3. On 12 December, 1928, the parties modified their contract whereby it was agreed that certain extra work should be done on the building, the

defendant to pay for said extra work up to $12,000 and Shops to be responsible for the excess. The cost of the extra work amounted to $16,363.56, which the defendant paid.

4. On 29 March, 1929, the plaintiff loaned to Shops $3,000 secured by assignment of receipt set out in paragraph 2 above. Plaintiff notified defendant of said assignment, and defendant immediately notified plaintiff of its claim against Shops for extra work in excess of deposit.

5. Shops took possession of store 7 May, 1929.

6. Shops was adjudged a bankrupt in November, 1929, and paid about 7 cents on the dollar to unsecured creditors.

The court ruled that plaintiff, as assignee, was entitled to recover the $3,000 deposited with defendant by Shops, free from any set-off or counterclaim which the defendant might have against Shops for excess cost of extra work.

From this ruling, the defendant appeals, assigning error.

Cansler & Cansler for plaintiff.
Jno. A. McRae and Travis Brown for defendant.

STACY, C. J. If the receipt, upon which the plaintiff sues as assignee, stood alone, there might be considerable strength in the position that it created a pledge, which shielded said funds from any claim of set-off (*Bank v. Winslow,* 193 N. C., 470), but, viewed in the light of all that transpired between the parties, we think it must be regarded as subject to the defendant's counterclaim in the nature of a recoupment for moneys paid in excess of $12,000 for extra repairs on the building. *Hurst v. Everett,* 91 N. C., 399.

The case in a nutshell is this: Shops deposited $3,000 with the defendant, pending construction of the building, to guarantee faithful performance of lease on its part, said amount to be returned upon execution of bond or beginning of lease. A month later, and before the store was ready for occupancy, a supplemental agreement was entered into whereby Shops became indebted to defendant in the sum of $4,363.56 for extra repairs on the building. Thereafter, "we had no intention of returning the money, we considered it ours," says the treasurer of the defendant company. Taken in its entirety, therefore, the rights and liabilities of the parties may be said to arise out of the same contract. The deposit made by Shops was but one step in the negotiations.

Moreover, there is respectable authority for the position that a deposit of money to guarantee the faithful performance of a contract creates the relation of debtor and creditor, and not that of pledgor and pledgee, or bailor and bailee. *Wilcox v. Gauntlett,* 200 Mich., 272, 166 N. W., 856. There was error in directing a verdict against the defendant.

New trial.

CARR WHITMIRE v. THE PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY OF CHATTANOOGA, TENNESSEE.

(Filed 12 July, 1933.)

Insurance T c—Held: insured ratified provisions of policy giving insurer right to cancel, and could not recover for agent's misrepresentations.

Insurer issued a group policy of insurance which provided that insurer should have the option to cancel it after notice at the expiration of any year if a certain per cent of the employees did not avail themselves of its provisions. Insurer canceled the policy in accordance with its terms. Plaintiff received notice of intention to cancel and allowed his premium to be deducted from his wages after such notice, and then received notice of cancellation, and accepted without protest his wages without any deduction for premium. Plaintiff brought suit alleging fraud and deceit in that insurer's agent had represented at the time he subscribed for the insurance that the policy should remain in effect as long as he remained in his employment or until he was retired upon pension: *Held*, plaintiff, with full knowledge, had ratified the provisions of the policy at variance with the agent's representations, and insurer's motion to nonsuit should have been allowed.

CLARKSON, J., dissents.

APPEAL by defendant from *Clement, J.*, at October Term, 1932, of BUNCOMBE.

Civil action to recover damages for alleged fraudulent issue and cancellation of accident and health policy of insurance.

The record discloses that on 1 November, 1929, the defendant issued a policy of group insurance covering members of the Southern Railway System Employees Pension Association, of which plaintiff was a member.

Said policy contains the following provision with respect to the right of discontinuance:

"Section (6) The company shall have the option of declining to renew this policy at the expiration of any policy year following the effective date hereof if the total number of employees insured is less than fifty per cent of the total average number of employees in service of the employer. The company agrees to give the association sixty days advance notice in writing in the event this option is exercised."

A similar provision appears in the application for said policy which was executed and filed by the Employees Pension Association.

As not more than 20% of the Southern Railway System Employees took advantage of this group insurance, which number had been reduced to approximately 10% in September, 1931, the defendant notified plaintiff and all other insured employees, that it elected to discontinue said insurance and that the same would terminate at the expiration of the policy year 1 November, 1931. This notice was given only after re-

peated efforts to increase the number of employees in the association, failing in which, alternative offers of different insurance were made, but without success.

The gravamen of plaintiff's complaint is, that M. L. Chunn, a member of the Employees Pension Association, and who is alleged to have solicited plaintiff to join the association and take out a certificate of insurance under the group plan, assured plaintiff that said certificate "could not be canceled so long as he remained in the service of the Southern Railway."

The jury returned the following verdict:

"1. Did the defendant through its agent represent to the plaintiff that it could and would issue the plaintiff an accident and health policy described in the complaint containing the provisions alleged in the complaint, to be retained in force so long as the plaintiff remained in the active services of the Southern Railway System, or until such time as he was retired upon an old age pension? Answer: Yes.

"2. If so, were such representations false and made for the purpose of deceiving the plaintiff? Answer: Yes.

"3. If so, were such representations relied upon by the plaintiff? Answer: Yes.

"4. If so, was the plaintiff induced thereby to enter into said contract of insurance? Answer: Yes.

"5. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $929.76."

From a judgment on the verdict, defendant appeals, assigning as error the refusal of the court to dismiss the action as in case of nonsuit.

J. W. Haynes and John E. Baumberger for plaintiff.
John A. Chambliss and Sale, Pennell & Pennell for defendant.

STACY, C. J. The defendant has done no more than it had a right to do under the terms of its contract. In recognition of this fact, the plaintiff has bottomed his alleged cause of action on fraud and deceit, and seeks to recover in tort, but a careful perusal of the record leaves us with the impression that it is barren of evidence sufficient to carry the case to the jury on the theory advanced by the plaintiff.

It appears from the testimony that under date of 1 September, 1931, the plaintiff received a letter from the defendant advising him that continuance of the insurance was contingent on not less than fifty per cent of the employees of the Southern Railway System subscribing for the group insurance, that up to that time they had not done so, and that it would be necessary to discontinue under paragraph six of the policy, or make other adjustments. He was also advised that if adjustments

were not agreed upon, no deduction for premium would be made after 31 October following. The plaintiff made no answer to this letter, but acquiesced in the payment or collection of a premium after it had been received. Under date of 30 September, 1931, the plaintiff received a letter from the defendant stating that the insurance would be discontinued as of 1 November, 1931, that thereafter he would have no insurance, and that "no deductions will be made from your October earnings or thereafter in payment of protection thereunder." The plaintiff did not reply to this letter, but received, without protest, his October earnings without any premium deduction. He instituted this action 28 April, 1932, for "fraudulent and unlawful cancellation." It would seem that the plaintiff, with full knowledge, has ratified the provisions of the policy at variance with the representations made by Chunn. He will not be permitted "to have his cake and eat it too." *Starkweather v. Gravely,* 187 N. C., 526, 122 S. E., 297.

The case is unlike *Elam v. Realty Co.,* 182 N. C., 599, 109 S. E., 632, where it was said an insurance agent or broker who undertakes to procure a policy of insurance for another, affording protection against a designated risk, may be held liable in damages for his negligent failure to exercise ordinary care in the discharge of the obligation assumed by him. The motion to nonsuit should have been allowed.

Reversed.

CLARKSON, J., dissents.

THE BANK OF SPRUCE PINE v. HALE VANCE, FLORENCE VANCE AND IRA VANCE.

(Filed 12 July, 1933.)

1. Bills and Notes C c—Estate held not liable on note signed by administrator purely for accommodation of makers.

Defendant, an administrator, endorsed a note in the name of the estate, thereunder writing his name as administrator. In an action on the note by the payee judgment was rendered against the makers, which judgment was not paid, and the payee sought to recover on the endorsement. The payee did not allege that the intestate was indebted to him at the time of his death or that his estate received any consideration for the note. Defendant alleged that he signed the note as an accommodation to the makers: *Held,* plaintiff was not entitled to judgment on the pleadings against the administrator in his representative capacity.

2. Same—Party signing note in representative capacity under agreement that he should not be personally liable is not liable to payee.

Where an administrator signs a note in the name of the estate and thereunder writes his name as administrator, and at the time of the

execution of the note the parties agree that he should not be personally liable thereon, the payee may not hold the administrator personally liable thereon, C. S., 3001, and where in an action on the note the administrator alleges such agreement the plaintiff payee is not entitled to judgment on the pleadings against him personally.

APPEAL by the defendant, Ira Vance, from *McElroy, J.*, at November Term, 1932, of MITCHELL. Reversed.

This is an action on a note for $600.00. The note is fully set out in the complaint. It is payable to the order of the plaintiff, and was due prior to the commencement of this action.

The defendants, Hale Vance and Florence Vance, the makers of the note, did not file an answer to the complaint. For this reason, judgment by default final was rendered by the clerk of the court against these defendants for the amount of the note. This judgment has not been paid.

The note as set out in the complaint, is endorsed as follows:

"T. B. Vance estate, S. C. Vance, Ira Vance, administrators."

The defendant, Ira Vance, filed an answer to the complaint in which he admitted the execution of the note by the defendants, Hale Vance and Florence Vance, as makers, and its endorsement by him and S. C. Vance as appears on the note.

He alleges "that the said note sued on by the plaintiff in this action, set out in paragraph two of the complaint, was endorsed in the name of 'T. B. Vance Estate, S. C. Vance and Ira Vance, administrators,' as an accommodation for the makers of said note; that the defendant, Hale Vance, is a son of T. B. Vance, deceased, and defendant, Florence Vance, is the wife of Hale Vance and the estate of T. B. Vance, deceased, has not yet been settled up by the administrators of said estate, and the said note sued on by the plaintiff was not and was not intended to be personally endorsed by this defendant, but endorsed by the administrators of the estate of said T. B. Vance, as such administrators in the name of T. B. Vance Estate, to which endorsement reference is hereby made."

When the action was called for trial, the plaintiff moved for judgment in the pleadings. The motion was allowed, and the defendant excepted.

From judgment that plaintiff recover of the defendant, Ira Vance, the sum of $600.00, with interest from 23 January, 1932, and the costs of the action, the defendant appealed to the Supreme Court.

McBee & McBee for plaintiff.
Charles Hughes for defendant.

CONNOR, J. It does not appear from the pleadings in this action that T. B. Vance was indebted to the plaintiff, at his death, or that his estate received any consideration for the note sued on by the plaintiff. It is

alleged in the answer that the defendants, S. C. Vance and Ira Vance, as administrators of the estate of T. B. Vance, endorsed the note solely for the accommodation of the makers. It is clear, therefore, that the plaintiff is not entitled to judgment on the pleadings for the amount of the note against the defendants as administrators of T. B. Vance, deceased. *Banking Co. v. Morehead,* 122 N. C., 318, 30 S. E., 331.

There is nothing on the face of the note which shows that the defendant, Ira Vance, did not intend to become personally liable on the note by reason of his endorsement as administrator. It is alleged, however, in his answer that it was not the intention of the parties that he should become personally liable. In view of this allegation, which for the purpose of this appeal is admitted, it was error to allow plaintiff's motion for judgment on the pleadings. See *Banking Co. v. Morehead,* 116 N. C., 413, 21 S. E., 191.

If it shall be found at the trial of the action that it was understood by the parties to the note, at the time it was endorsed by the defendants, S. C. Vance and Ira Vance, as administrators, that they did not thereby become personally liable, the plaintiff will not be entitled to judgment against Ira Vance, personally, for the amount of the note. C. S., 3001. The judgment is

Reversed.

G. A. CALLAHAN ET AL. V. J. F. FLACK, ADMINISTRATOR.

(Filed 12 July, 1933.)

Taxation F c—Sureties paying note given for taxes held not entitled to subrogation to tax lien under facts of this case.

The owner of land executed a note with sureties for his taxes in order to prevent the foreclosure of the tax liens, and the unsigned tax receipts were detached from the record and attached to the note. After the landowner's death his administrator renewed the note with the same sureties. The sureties were required to pay the note and the sheriff paid the proceeds thereof to the county in settlement of the taxes. The estate was insolvent and the land was sold to make assets. The sureties claimed priority of payment out of the assets of the estate, alleging that it was agreed between the parties that they were to be subrogated to the rights of the sheriff in the event they were required to pay the note: *Held,* the tax lien was lost or rendered unenforceable as against other creditors of the estate, and the sureties were not entitled to priority.

APPEAL by plaintiffs from *McElroy, J.,* at November Term, 1932, of RUTHERFORD.

Controversy without action to determine priority of claim to assets in hands of administrator, submitted on an agreed statement of facts under C. S., 626.

The personal estate of defendant's intestate is insufficient to pay the debts of the deceased, and his lands have been sold to make assets.

The plaintiffs contend they are entitled to a preferred claim against the estate of defendant's intestate by reason of the following facts:

1. On 26 February, 1929, during the lifetime of defendant's intestate, in order to avoid a sale of his land for taxes, levied for the years 1925, 1926, and 1927, the said intestate executed his promissory note, in the amount of $786.80, to W. C. Hardin, sheriff and tax collector of Rutherford County, with the plaintiffs as sureties thereon, and the unsigned tax receipts were attached thereto.

2. This note was renewed by the administrator of the deceased in November, 1930, with plaintiffs as sureties on said renewal note, and the tax receipts with others for the years 1926 and 1927 were also attached thereto.

3. In October, 1931, plaintiffs as sureties were required to pay said note, in consequence of which they now claim a lien on the funds derived from a sale of the lands to make assets. This by right of subrogation, they say. It was agreed by the sheriff, defendant's intestate and the plaintiffs that the tax lien should remain in force until said note was paid, and that plaintiffs should be subrogated to the rights of the sheriff in case they were required to pay the note.

4. The sheriff paid the amount of said note to Rutherford County in his annual tax settlement with the county.

From an order denying the plaintiffs any priority to assets in hands of administrator, they appeal, assigning error.

Stover P. Dunnagan for plaintiffs.
Quinn & Hamrick and J. S. Dockery for defendant.

STACY, C. J. It would seem that under the decision in *Guaranty Co. v. McGougan,* 204 N. C., 13, the tax lien was lost or rendered unenforceable, certainly as against other creditors of the estate, when the original receipts were detached from the record, and the sheriff settled with the county for said taxes.

The case is unlike *Hunt v. Cooper,* 194 N. C., 265, 139 S. E., 446, *Berry v. Davis,* 158 N. C., 170, 73 S. E., 900, where it was held, in line with a number of decisions, that the sheriff's settlement with the county did not extinguish the delinquent taxpayer's liability. *Jones v. Arrington,* 91 N. C., 125; *S. c.,* 94 N. C., 541.

In the instant case, as in *Guaranty Co. v. McGougan, supra,* the rights of others have intervened—creditors who are entitled to rely upon the public records.

Affirmed.

KATE W. HAM ET AL. v. CITY OF DURHAM.

(Filed 12 July, 1933.)

Municipal Corporations E c—City held not liable for damages resulting to abutting property by reason of narrowing sidewalk.

An abutting owner may not recover from a city damages resulting to his property by reason of the fact that the abutting sidewalk has been narrowed in order to widen the street under orders of the city commissioners, the width of the street and sidewalk being within the sound discretion of the commissioners.

APPEAL by plaintiffs from *Small, J.,* at January Term, 1933, of DURHAM.

Civil action to recover damages or compensation for injury to plaintiffs' lot located at "Five Points" in the city of Durham.

The plaintiffs are owners of the triangular building located at the apex of one of the acute angles formed by the intersection of Main and Chapel Hill Streets. In grading, hardsurfacing and widening Chapel Hill Street so as to make it an uniform 40-foot thoroughfare, the commissioners of the city of Durham narrowed the sidewalk on said street, adjacent to plaintiffs' property, from 8 feet to approximately 2 feet in width. And even this remaining strip is not uniform; it tapers and is obstructed by lamp posts and signs. Plaintiffs allege that they have been damaged in a large sum by reason of the virtual destruction of the sidewalk abutting on their property on the Chapel Hill Street side. There is no allegation of negligence on the part of the city in making the change or in doing the work.

The facts are not in dispute. The inconvenience or damage to plaintiffs' property is practically admitted, but the defendant says the widening of Chapel Hill Street was found necessary, and was ordered by the commissioners in the exercise of a sound discretion, and that whatever injury plaintiffs have sustained must be regarded as *damnum absque injuria.*

This view prevailed in the court below, and the plaintiffs have appealed from the judgment of nonsuit.

Bryant & Jones for plaintiffs.
S. C. Chambers for defendant.

STACY, C. J. In an action involving this same property, and where a diagram of it appears, *Hester v. Traction Co.,* 138 N. C., 288, 50 S. E., 711, *Clark, C. J.,* delivering the opinion of the Court, said:

"The sidewalk is simply a part of the street which the town authorities have set apart for the use of pedestrians. 27 A. & E. Enc. (2 ed.), 103;

Ottawa v. Spencer, 40 Ill., 217; *Chicago v. O'Brien,* 53 Am. Rep., 640. The abutting proprietor has no more right in the sidewalk than in the roadway. His rights are simply that the street (including roadway and sidewalk) shall not be closed or obstructed so as to impair ingress or egress to his lot by himself and those whom he invites there for trade or other purposes. *Moose v. Carson,* 104 N. C., 431; *White v. R. R.,* 113 N. C., 610. As said in *S. v. Higgs,* 126 N. C., 1014: 'An abutting owner to a street and sidewalk has an easement in his frontage which he may use in subordination to the superior rights of the public.' Sidewalks are of modern origin. Anciently they were unknown, as they still are in eastern countries and in perhaps a majority of the towns and villages of Europe. In the absence of a statute, a town is not required to construct a sidewalk. *Attorney-General v. Boston,* 142 Mass., 200. It is for the town to prescribe the width of the sidewalk. In the absence of statutory restriction it may widen, narrow, or even remove a sidewalk already established. *Attorney-General v. Boston, supra.* To widen a sidewalk narrows the roadway. To widen the roadway narrows the sidewalk. The proportion of the street to be preserved for pedestrians and vehicles respectively is in the sound discretion of the town authorities."

Neither the industry of counsel nor our own investigation has discovered a case in this jurisdiction which may be said to cover the exact question here presented, but the tendency of the decisions is to regard the matter as resting in the sound discretion of the governing authorities. And so the statutes, dealing with the subject, have been framed upon the same theory. C. S., 2675, 2703, and 2787.

Contrary decisions may be found in other jurisdictions, but with us the principle has been followed with insistence. *Crotts v. Winston-Salem,* 170 N. C., 24, 86 S. E., 792; *Meares v. Wilmington,* 31 N. C., 73. The judgment of nonsuit is accordant with this policy, and will be upheld.

Affirmed.

EVELYN JOLLEY v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 12 July, 1933.)

Appeal and Error K f—Petition to rehear is dismissed in this case.

Where it does not appear upon a petition to rehear that the question of law therein presented was decided without due consideration or that the Court overlooked any material fact or principle of law; and no additional authority is presented by petitioners in their brief on the rehearing, and there is no error of law in the decision, the petition will be dismissed.

PETITION by defendant for a rehearing of its appeal from the judgment of the Superior Court of CLEVELAND County in this action. Petition dismissed.

B. T. Falls for plaintiff.
Francis R. Stark and Alfred S. Barnard for defendant.

CONNOR, J. Defendant's appeal from the judgment of the Superior Court of Cleveland County in this action was heard at the Fall Term, 1932, of this Court, and was decided on 8 February, 1933. The judgment was affirmed. See *Jolley v. Telegraph Co.,* 204 N. C., 136, 167 S. E., 575.

On 9 March, 1933, the defendant filed its petition for a rehearing of its appeal. The petition was allowed, and the appeal docketed for a rehearing on 27 May, 1933. Rule 44, Rules of Practice in the Supreme Court. 200 N. C., 838.

In its petition, the defendant contends that there was error at the trial in the Superior Court, with respect to the third issue involving the damages which plaintiff is entitled to recover of the defendant, and that this Court erroneously failed to sustain its contention in that respect, which was duly presented by its appeal from the judgment of the Superior Court. It contends that on all the evidence at the trial, the plaintiff was not entitled to recover of the defendant more than nominal damages for the injury which she sustained by reason of the negligent failure of the defendant to transmit and deliver the telegram which she had filed with the defendant. This contention was carefully considered at the hearing of defendant's appeal, as will appear by reference to the opinion of this Court. On the authorities cited in the opinion, the defendant's contention was not sustained. There was evidence tending to show that plaintiff was entitled to recover of the defendant compensatory damages. This evidence was submitted to the jury under instructions which are in accord with well settled principles of law.

The defendant's petition for a rehearing of its appeal is dismissed on the authority of *Weston v. Lumber Co.,* 168 N. C., 98, 83 S. E., 693. It does not appear from the petition that the question of law presented thereby was decided hastily or without due consideration; or that any material fact or pertinent principle of law was overlooked by this Court. No additional authority supporting the contention of the defendant has been cited in the brief filed by the defendant on the rehearing of its appeal. McIntosh N. C. Practice & Procedure, p. 811. The decision at the hearing of defendant's appeal is in accord with the authorities cited in the opinion, and with well settled principles of law. The decision will stand, and the judgment affirming the judgment of the Superior Court will not be disturbed.

Furthermore, it is observed that the sufficiency of plaintiff's telegram to create an acceptance of the position to which she had been elected, and to make a contract between her and the trustees of the Manteo High School, does not seem to have been questioned at the trial of the action. All the evidence showed that she had been duly elected as a teacher in the Manteo High School for the term of one year, at a fixed salary, and that she failed to receive this salary because of the negligent breach by the defendant of its contract with her to transmit and deliver her telegram of acceptance.

Petition dismissed.

MISSOURIA WELLS ET AL. V. WILLIAM E. ODUM ET AL.

(Filed 12 July, 1933.)

Wills D h—Evidence of probate of will in common form is incompetent in caveat proceedings.

The probate of a will in common form without citation to those in interest "to see the proceedings" C. S., 4139, is an *ex parte* proceeding and not binding on caveators upon the issue of *devisavit vel non* raised in their direct attack upon the validity of the will, and the admission in evidence in the caveat proceedings of the order of probate constitutes reversible error.

APPEAL by caveators from *Harris, J.,* at November Term, 1932, of CRAVEN.

Issue of *devisavit vel non,* raised by a caveat to the will of Minnie L. Odum, based upon want of genuineness and lack of due execution of paper-writing propounded.

The propounders in assuming the burden of proving the genuineness and due execution of the alleged will, offered in evidence, over objection of caveators, (1) letters testamentary; and (2) order of clerk entered at the time the paper-writing was probated in common form. The record states this evidence was offered in corroboration of the clerk's testimony. The clerk had previously testified that he issued the letters testamentary, but not that he entered the order of probate.

There was a verdict finding the paper-writing propounded to be the last will and testament of the alleged testatrix, and from the judgment entered thereon, the caveators appeal.

H. P. Whitehurst and R. A. Nunn for propounders.

D. H. Willis and Ward & Ward for caveators.

STACY, C. J. Is the probate of a will in common form competent as evidence of its validity on an issue of *devisavit vel non,* raised by a caveat filed to said will? The answer is, No. *Dickens v. Bonnewell,* 168 S. E. (Va.), 610.

The paper-writing in question was offered for probate in common form without citation to those in interest "to see proceedings." *Benjamin v. Teel,* 33 N. C., 49; *Redmond v. Collins,* 15 N. C., 430. This is permissible under our practice, C. S., 4139, *et seq.,* and when thus probated in common form, even though the proceeding be *ex parte,* such record and probate is made conclusive as evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal, C. S., 4145, and is not thereafter subject to collateral attack. *In re Will of Rowland,* 202 N. C., 373, 162 S. E., 897.

But a caveat is a direct attack upon the will. The proceeding in common form before the clerk is *ex parte,* and, therefore, not binding upon the caveators, as they were not parties. *In re Will of Chisman,* 175 N. C., 420, 95 S. E., 769; *Mills v. Mills,* 195 N. C., 595, 143 S. E., 130.

If it should be held that the order of the clerk adjudging the will to be fully proved in common form is "conclusive in evidence of the validity of the will" (C. S., 4145) on the issue of *devisavit vel non,* raised by a caveat filed thereto, then the requirement that the propounders shall, upon such issue, prove the will *per testes* in solemn form (*In re Will of Chisman, supra*), would seem to be wholly unnecessary, and no caveat filed after probate in common form could ever be sustained. *In re Will of Rowland, supra.*

Hence, for the error in admitting the probate in common form as competent evidence on the issue of *devisavit vel non,* raised by a caveat filed to the will in question, the caveators are entitled to a new trial, and it is so ordered.

New trial.

WILLIS ROBERTSON v. VIRGINIA ELECTRIC AND POWER COMPANY ET AL.

(Filed 12 July, 1933.)

New Trial B g—This case is remanded in order that new trial may be awarded if it is found that testimony of material witness was false.

In this case defendant moved in the Supreme Court for a new trial on the ground of newly discovered evidence, and filed an affidavit of a material witness repudiating his testimony upon the trial. Plaintiff took deposition of the witness in which the witness swore that the affidavit was false. In the Supreme Court the case together with the motion is

remanded to the Superior Court to the end that the court with the aid of the solicitor may investigate the charges and counter-charges, and that a new trial may be awarded if it be ascertained that the witness' testimony upon the trial was false.

MOTION by defendant for new trial on ground of newly discovered evidence.

Original opinion reported, 204 N. C., 359.

E. L. Owens and Ward & Grimes for plaintiff.

T. Justin Moore, Zeb Vance Norman and Spruill & Spruill for defendants.

STACY, C. J. Petition to rehear for the purpose of lodging motion for new trial on ground of newly discovered evidence was filed in this cause immediately upon delivery of the opinion, 15 March, 1933, under authority of what was said in *Allen v. Gooding,* 174 N. C., 271, 93 S. E., 740.

The motion for a new trial is accompanied by an affidavit signed by Maurice Whidbee in which he retracts his testimony given on the hearing. He stated on the trial that he saw employees of the defendant set fire to a yellow jackets' nest which spread from defendant's right of way to plaintiff's woods. In the affidavit filed here, it is said this testimony was wrong, "the fact is I know nothing about the origin of the fire."

Thereafter, the plaintiff took the deposition of Morris Whedbee or Maurice Whidbee, the affiant, in which he says the affidavit is false, and that he was suborned by one Elmer Jackson to make it. This is categorically denied by Jackson.

Thus, it appears that a material witness for the plaintiff on the hearing has first repudiated and then repudiated the repudiation of his testimony in this Court on the defendant's motion for a new trial. We do not know where the truth lies, nor how the witness might testify on another hearing, if, indeed, this may now be regarded as a determining factor in the matter. The case, therefore, together with the motion, will be remanded to the Superior Court of Washington County, to the end that the charges and counter-charges may there be investigated with the aid of the solicitor, if needed. And if it should be found that the testimony given by the witness on the trial was false, the Superior Court will award a new trial; otherwise not. This course seems necessary in view of the unusuality of the record.

Remanded.

CARL TRIPLETT, ADMINISTRATOR OF DIAMOND O. TRIPLETT, DECEASED, v. THE SOUTHERN RAILWAY COMPANY.

(Filed 12 July, 1933.)

Railroads D c—Doctrine of last clear chance held applicable, and nonsuit should have been overruled in this action for wrongful death.

Evidence tending to show that plaintiff's intestate, an eleven-year-old boy, was sitting on a cross-tie about twenty feet from defendant's public grade crossing, that he was grazing a cow which he was holding by a chain, that he was looking down, and when the train was about fifty feet from him, got up and stooped over as though doing something, and was struck and killed by defendant's train, that the engineer failed to blow for the crossing, and that the track was straight and unobstructed for a distance of about two hundred yards and that the engineer could have seen the intestate and the cow for that distance *is held* sufficient to take the case to the jury on the doctrine of last clear chance, the evidence tending to show that the intestate was on the track oblivious or otherwise insensible of danger.

STACY, C. J., dissenting.

BROGDEN, J., concurs in dissenting opinion.

APPEAL from *McElroy, J.*, at October Term, 1932, of WILKES. Reversed.

This is a civil action, for actionable negligence, brought by plaintiff against defendant, alleging damages for the death of Diamond O. Triplett, a boy of eleven years of age. The defendant denied negligence and set up the plea of contributory negligence.

The plaintiff's intestate, on 8 April, 1929, about 6:25 p.m., was killed by defendant, while operating its passenger train between Winston-Salem, N. C., and Wilkesboro, N. C. The plaintiff, in his complaint details his allegations of negligence against defendant, and alleges that "at the time of the grievances above set forth, the plaintiff's intestate, a boy of eleven years of age, was sitting, lying down or stooping over a point within a few feet of the public crossing on the defendant's track as above described with a cow near him and near the defendant's track, which he was minding or holding by a chain about twenty feet long, when said cow either became unruly or frightened at the sudden approach of the defendant's train, and ran up the defendant's track and either jerked or threw the plaintiff's intestate down on or near the defendant's track, or the plaintiff's intestate was endeavoring to loosen the chain which had become fastened to one of the spikes in defendant's railroad track, within a few feet of the railroad crossing and in such a condition and position as to indicate that he was in a perilous condition and position, which position and condition could have been

seen by the defendant's engineer for a distance of four or five hundred yards east of said crossing, the defendant's train approaching the plaintiff's intestate from the east to the west, which condition and position could have been or should have been seen by the defendant's engineer if he had been keeping a reasonable lookout and could have been seen in time for the defendant's engineer to have stopped said train in time to have prevented the death of the plaintiff's intestate, but that the defendant's engineer in charge of said train negligently and carelessly failed to give any warning either by blowing the whistle or ringing the bell to warn the plaintiff's intestate of the approach of said train and negligently and carelessly failed to stop said train in time to prevent the death of the plaintiff's intestate, which could have been done if the defendant's engineer in charge of said train had kept a reasonable lookout, and that by reason of said careless and negligent acts on the part of the defendant's engineer, agents and employees, the plaintiff's intestate came to his death."

Carl Triplett, plaintiff administrator, and father of the boy, testified, in part, as follows: "I am the father of Diamond O. Triplett. He is dead. Died on 8 April, 1929. I was in my kitchen when the train passed on that day, about 6:20 p.m. My home measures 21½ yards from the Southern Railroad track. There is a public crossing of the railroad something like 200 yards from my house, at which there is a stop sign. There is a whistle post above and very nearly even with my house about ¼ of a mile east of mile post No. 97. The whistle post is about 708 feet east of the public crossing. The passenger train was coming west from Winston-Salem to North Wilkesboro. My house is situated on the north side of the railroad track in going west. The public road that crosses the railroad about 200 yards west of my house runs along the north side of the railroad track in going west. The public road runs along from 10 to 25 feet from the railroad track from a point about opposite my house at the crossing a distance of about 200 yards. There is a North Carolina stop sign at the public crossing. J. V. Foster lives on the hill above the crossing. The boy was found 32 feet from the center of the crossing, this is where he was when I got to him. There is nothing along between the public road and railroad anywhere to obstruct the view of person coming up the road to the crossing. The railroad is practically straight from the whistle post to the crossing, just a little curve where the whistle post is located. The view of the railroad from the public crossing east is unobstructed for a half mile. The land is perfectly level upon which the road is constructed. The road is located along the edge of a level bottom. There isn't anything to obstruct the view of the engineer coming up west to this crossing for a half mile or more. The public crossing is used a good deal; it is a

public road and the United States mail passes it every day. I heard the train pass that evening. The engineer did not blow for the crossing. I heard him blow for the quarry, which is about three-quarters of a mile east of the crossing. He gave no crossing blow for that sign neither did he ring the bell. I heard the train stop and ran out of doors. I saw the baggage master and some of the passengers out and they said they had killed a boy. When I got there he was dead, it was my boy. . . . He was lying there about four feet of the track when I got to him. I sent the boy out about 5:00 o'clock that evening to graze the cow; the last time I saw him he was something like one-half of the way between the public crossing and my house, grazing the cow along the public road. Wind was blowing hard that evening; it was blowing down the river east. There is two crossings east of my house between the quarry and my house. The train did not blow for either of these crossings that evening. The crossing at which the boy was struck is west of my house. . . . He was a strong healthy boy, had never been sick; he was a smart boy to work, never gave me any trouble. The cow he was driving was a large red cow. The chain that was fastened to her was 20 feet long; it was a grade crossing where the boy was killed. . . . His body was found on the south side of the road. It was 32 feet from the center of the crossing to where the body was found; he was found on the side of the road where the public highway runs; he had already crossed the railroad. His body was found only about four feet from the rail on the roadbed of the railroad. The public road runs along parallel with the railroad at this point. . . . The main lick that the boy was struck was right behind the left ear, his head was busted plumb around but busted worse behind the left ear."

Loyd Richardson, witness for plaintiff, testified in part: "I saw the train as it come up the river. I saw the boy; he was on the left-hand side of the crossing about 12 or 15 feet, as well or near as I could make out, above the crossing. *He was kind of sitting down on the end of the ties, like he was looking down at the ground.* The cow was down below him, looked like about 12 to 15 feet. The cow was about half way between the public road and the railroad; she was on top of the fill just where it turns over the edge of the fill; I could see the cow plain; the cow was about 12 to 15 feet below the boy, both the cow and the boy were between the road and the railroad; the boy's face was turned towards me when the train was from 50 to 60 feet above Mr. Triplett's house; the boy got up and turned around like he was doing something; you can see a good way down the track down the river from the crossing, some four or five hundred yards. The railroad runs along the edge of the bottom practically level; there is a whistle post on the railroad just opposite Mr. Triplett's house; the wind was blowing down the river and

the train coming up the river; the train did not blow at the whistle post nor did it blow for the crossing; *when the boy got up he got up with his face towards me; he turned around like he was doing something and then stooped down; he was stooped over; the train was coming so quick I couldn't tell whether he sat down or not; I wouldn't be positive about that; he was sitting down and got up and turned around and was down like this (stooped).*"

J. V. Foster testified, in part: "I live on the hill about 200 yards a little northwest of where the boy was killed; I was at home on 8 April, 1929, when the train passed that evening. There is a whistle post about 200 yards east of the public crossing *the train did not blow nor did they ring the bell when it passed that evening the boy was killed.* I was something like 100 yards from the crossing when the train went up that killed the boy. I saw the boy just a few seconds before the train passed. I was going to the spring. *I saw the boy and the cow; the cow was on top of the fill in plain view of the engineer as was also the boy, the boy was sitting seemed to me at the end of a tie.* This is a public crossing and the mail passes there daily. I am not related to the parties and have no interest in the matter. I saw the boy there in that position, as above stated, less than 5 minutes before the train struck him. *When I saw the boy he was sitting at the end of a cross-tie between the two roads on the south side of the railroad about 20 feet from the crossing,* the best I could tell, in my opinion he was between 15 and 20 feet from the crossing. The cow was a large red cow; there wasn't anything to obstruct the view of the engineer from where the cow or boy in the position I saw him from the Triplett house to the whistle post, a distance of about 200 yards."

At the close of plaintiff's evidence the defendant made a motion in the court below for judgment as in case of nonsuit, C. S., 567, which was granted. Judgment was duly signed in accordance with the nonsuit. The plaintiff excepted and assigned error to the judgment as signed, and appealed to the Supreme Court.

Jones & Brown and Tam C. Bowie for plaintiff.

Burke & Burke of Taylorsville, N. C., and J. A. Rosseau of North Wilkesboro, N. C., for defendant.

CLARKSON, J. We think the evidence sufficient to be submitted to a jury and the motion for nonsuit in the court below should have been overruled.

In *Jenkins v. R. R.*, 196 N. C., 466, speaking to the subject, at p. 469, is the following: "If the jury found from the evidence that the deceased by his own negligence contributed to the injuries which re-

sulted in his death, then there was evidence from which the jury could have further found that notwithstanding such contributory negligence, the proximate cause of such injuries was the failure of defendants to exercise due care, after deceased could have been discovered, sitting on the end of the cross-tie, in an apparently helpless condition, to stop the train and thus avoid the injuries to deceased. The principle upon which the doctrine of the 'last clear chance' is founded, is recognized and enforced in this jurisdiction, as just and necessary for the protection of human life. *Redmon v. R. R.,* 195 N. C., 764, 143 S. E., 829. . . . (p. 470.) It has been the policy of the law, certainly in this jurisdiction, as shown by numerous decisions of this Court, to hold railroad companies, and their employees, in charge of moving trains, to a high standard of duty towards persons who are or who may reasonably be expected to be on their tracks in front of a moving train. This policy is justified as tending to protect human life. That its vigorous enforcement may sometimes result in the recovery of damages in a case where upon its peculiar facts, the plaintiff does not seem to be entitled to damages does not require or justify a relaxation of well settled principles." *Hill v. R. R.,* 169 N. C., 740; *Caudle v. R. R.,* 202 N. C., 404.

In *Allman v. R. R.,* 203 N. C., 660, at p. 663, we said: "There is no evidence sufficient to be submitted to the jury that the plaintiff's intestate was asleep or drunk on the track, or in a helpless condition on the track, or oblivious or otherwise insensible of danger. The plaintiff's intestate was not at a crossing." This matter is fully discussed in *Hill v. R. R., supra.*

We will not comment on the evidence, as the case goes back to be tried by a jury, but we will say that the evidence, direct and circumstantial, on the part of plaintiff indicates, if believed by a jury, that plaintiff's intestate was oblivious or otherwise insensible of danger, and therefore the case should have been submitted to a jury. For the reasons given, the judgment of nonsuit must be

Reversed.

STACY, C. J., dissenting: It was said in *Talley v. R. R.,* 163 N. C., 567, 80 S. E., 44, "that the engineer of a moving train who sees, on the track ahead, a pedestrian who is alive and in the apparent possession of his strength and faculties, the engineer not having information to the contrary, is not required to stop his train or even slacken its speed because of such person's presence on the track. Under the conditions suggested, the engineer may act on the assumption that the pedestrian will use his faculties for his own protection and will leave the track in time to save himself from injury," a position fully supported by innumerable authorities. See especially *Abernathy v. R. R.,* 164 N. C., 91, 80 S. E., 421.

Applying this principle to the facts of the instant case, it seems to me the judgment of nonsuit is correct.

In order to take the case out of the above principle, the plaintiff must show (1) that the deceased was in a position of peril and apparently insensible to danger; (2) that the engineer, by the exercise of ordinary care, could have discovered his plight and stopped the train before reaching him; and (3) that the failure to exercise such care on the part of the engineer was the proximate cause of plaintiff's intestate's death. *Clegg v. R. R.*, 132 N. C., 292, 43 S. E., 836; *Harrison v. R. R.*, 204 N. C., 718. The showing on the part of the plaintiff is not sufficient to carry the case to the jury.

BROGDEN, J., concurs in dissent.

EVANGELINE STINCHCOMBE WYATT v. W. C. BERRY, D. A. GREENE, AND THE CAROLINA MINERAL COMPANY.

(Filed 12 July, 1933.)

1. Judgments K f—

A judgment void upon its face is subject to collateral attack.

2. Judgments K d—Judgment against minor not a party to action and whose interest was not presented to Court is not binding on the minor.

Where an attorney appears in court in an action for the recovery of land, and asks that an infant be made a party to the action and a guardian *ad litem* be appointed for her, which is done, but no service of summons is made on her as required by statute, C. S., 451, 483(2), and the guardian files answer denying the allegations of the complaint, but does not disclose the interest of the infant in the land involved in the action or the facts upon which her interest rests: *Held*, a judgment entered in the action is void as to the infant, it appearing from the record that the interest of the infant was not presented to the court in good faith and was not passed upon by the court.

3. Judgments K a—

A consent judgment against a minor is void as to such minor where it appears from the record that there was no investigation by the court of the minor's interest and that the judgment was not approved by the court.

APPEAL by plaintiff from *McElroy, J.*, at November Term, 1932, of MITCHELL. Reversed.

This is an action to recover possession of the tract of land described in the complaint. The said tract of land is situate in Mitchell County,

North Carolina, and is described in the complaint by metes and bounds. It contains 347 acres, more or less, and is known as the Stinchcombe land.

The plaintiff is the only child of Dr. John Stinchcombe by his marriage to his second wife, Mrs. Laura Stinchcombe. She is the sister of Paul J. Stinchcombe, who was the only child of her father by his first marriage. Both her father, Dr. John Stinchcombe and her brother, Paul J. Stinchcombe, are dead, both having died prior to the commencement of this action. Paul J. Stinchcombe, as the only heir at law of his deceased mother, was the owner in fee of the tract of land described in the complaint, subject to the life estate of his father, Dr. John Stinchcombe, who survived him. Plaintiff is the only heir at law of her deceased brother, Paul J. Stinchcombe, and as such is the owner in fee and entitled to the possession of said tract of land, unless she is estopped to recover the same by a judgment rendered in the Superior Court of Mitchell County, at November Term, 1919. The defendants are in possession of said tract of land, claiming title thereto under said judgment. Plaintiff alleges in her complaint that said judgment is void, and is therefore not an estoppel against her in this action.

On 4 September, 1918, a deed dated 22 August, 1918, was recorded in the office of the register of deeds of Mitchell County. This deed purports to have been executed by Paul J. Stinchcombe and his wife, and is sufficient in form to convey the tract of land described in the complaint in this action to T. C. Robinson. All the evidence at the trial, however, shows that this deed is a forgery, and that it was not executed by Paul J. Stinchcombe, but that his name was signed thereto by one Rod C. Lucas pursuant to a conspiracy between the said Lucas and T. C. Robinson, the grantee in the deed.

On 19 February, 1919, an action was begun in the Superior Court of Mitchell County, which was entitled, "T. C. Robinson *v.* Laura Stinchcombe." The plaintiff in that action alleged in his complaint that he was the owner in fee and was entitled to the possession of the tract of land described in the complaint, and that the defendant, Laura Stinchcombe, was in the unlawful and wrongful possession of the same. The tract of land described in the complaint in that action is the same as that described in the complaint in this action. At November Term, 1919, of said court, the defendant, Laura Stinchcombe, filed an answer to the complaint in which she denied the allegations therein. At the said term, on the application of W. C. Berry, who represented himself as an attorney for Evangeline Stinchcombe, it was ordered by the court that the said Evangeline Stinchcombe, who was then an infant of the age of nine years, be made a party defendant in said action, and that J. L. Mc-

Kinney be appointed as guardian *ad litem* for her. No summons was issued in the action for the said infant. Neither she nor her mother, Laura Stinchcombe, with whom she resided in Mitchell County, knew that she had been made a party to the action, or that a guardian *ad litem* had been appointed for her therein. On the same day that he was appointed guardian *ad litem,* J. L. McKinney filed an answer in behalf of Evangeline Stinchcombe, in which he denied the allegations of the complaint. There was no allegation therein that she was in possession of the tract of land described in the complaint, or that she claimed any right, title, or interest therein.

Thereafter, at the same term of the court, at which the answers were filed by the defendant, Laura Stinchcombe, and the guardian *ad litem* for Evangeline Stinchcombe, a judgment was entered in the action as follows:

"State of North Carolina—Mitchell County.

In the Superior Court—November Term, 1919.

T. C. Robinson

v.

Laura Stinchcombe, by John C. McBee, her guardian *ad litem.*

Judgment.

This cause coming on for hearing, and being heard by his Honor, B. F. Long, judge, and it appearing to the court that the parties plaintiff and defendants have compromised their differences upon the following terms, that is to say, that the plaintiff be decreed the owner in fee and be given possession of the land described in the complaint, and that the defendants have and receive the sum of two thousand dollars from the plaintiff;

It is, therefore, ordered, adjudged and decreed by the court that the plaintiff is the owner in fee and entitled to the immediate possession of the lands described in the complaint, being the lands described in a deed from Paul J. Stinchcombe and wife to T. C. Robinson, of record in Book No. 71 at page 323, office of the register of deeds of Mitchell County. It is further adjudged by the court that the plaintiff pay to the defendants the sum of two thousand dollars and that the plaintiff pay the costs of this action, to be taxed by the clerk.

(Signed.) B. F. LONG, *Judge Presiding.*

By consent:

Charles E. Green and Hudgins & Watson attorneys for plaintiff.

McBee & Berry and Newland & Ervin attorneys for defendant.

McBee & Berry guardian *ad litem* for Evangeline Stinchcombe."

There was evidence tending to show that T. C. Robinson, plaintiff in the action, paid to McBee & Berry, attorneys for defendants, the sum of two thousand dollars pursuant to said judgment. There was no evidence that said sum or any part thereof was paid to Evangeline Stinchcombe. The sum of $666.67 was paid by W. C. Berry into the office of the clerk of the court, and subsequently disbursed by said clerk. No part of this sum was paid to Evangeline Stinchcombe or to any one for her, except the sum of $20.00, which was expended by her mother in the purchase of clothes for her during her infancy.

At the close of the evidence for the plaintiff, judgment was entered in this action as follows:

"North Carolina—Mitchell County.

In the Superior Court—October Term, 1932.

Evangeline Stinchcombe Wyatt

v.

W. C. Berry, D. A. Greene and The Carolina Mineral Company.

Judgment.

This cause coming on to be heard before his Honor, P. A. McElroy, judge, and a jury, and at the close of the plaintiff's testimony, the defendants having pleaded a former judgment concerning the same subject-matter and between the same parties or their privies, and the plaintiff having offered in evidence the entire record in the former suit, for the purpose of attack, and the court finding as a fact that this action regards the same identical property as was described in the former action, and that the plaintiff was a defendant in that suit, and the defendants in this action having taken their title since the final judgment in that cause was signed, and are privies to the plaintiff in the former action, the court is, therefore, of the opinion that the judgment in the former action was decisive of all matters in that action, and precludes the plaintiff from recovering in this action and the said judgment being an estoppel by record and the matters are now *res judicata,* the motion is, therefore, allowed, and it is adjudged by the court that the plaintiff owns no interest in the land described in the complaint, and the defendants are the owners of the respective interests set up in their answers;

It is further ordered and adjudged by the court that the defendants recover of the plaintiff their costs in this behalf expended."

From this judgment, the plaintiff appealed to the Supreme Court.

R. W. Wilson for plaintiff.

Watson & Fouts for defendants.

CONNOR, J. The judgment in the Superior Court of Mitchell County, at November Term, 1919, in the action entitled, "T. C. Robinson *v.* Laura Stinchcombe *et al.*," and relied on by the defendants in this action as an estoppel against the plaintiff, is void on its face as against her, and is, therefore, subject to collateral attack by her in this action.

The plaintiff was not a party to the action in which the judgment was rendered. At the time the judgment was rendered, she was an infant of nine years of age. It is true that a guardian *ad litem* was appointed by the court to protect her rights in the subject-matter of the action, and that this guardian *ad litem* filed an answer to the complaint, denying the allegations therein. This answer, however, does not disclose what interest, if any, the infant had in the land described in the complaint, nor does it present to the court the facts on which her interest in the land rests. No summons had been issued for or served on the infant prior to the appointment of the guardian *ad litem,* as required by statute, C. S., 451. This appears from the record, which was introduced as evidence at the trial.

It has been held by this Court that where a judgment has been rendered against an infant on whom summons was not served as required by statute (C. S., 483(2), but for whom a guardian *ad litem* was appointed by the court, and an answer was filed by such guardian *ad litem* in good faith, the judgment is conclusive on the infant, notwithstanding the irregularity, until set aside on motion in the cause. See *Welch v. Welch,* 194 N. C., 633, 140 S. E., 436, *Groves v. Ware,* 182 N. C., 553, 109 S. E., 568, *Harris v. Bennett,* 160 N. C., 339, 76 S. E., 217. There is no decision of this Court, however, to the effect that such judgment is conclusive and binding on the infant, where it appears upon the face of the record, as it does in the instant case, that the interests of the infant in the subject-matter of the action were not presented to the court in good faith by the guardian *ad litem,* and passed upon by the court. The facts disclosed by the record in this case, show the wisdom of the language used by *Bynum, J.,* in *Moore v. Gidney,* 75 N. C., 34, who in speaking of the statutory requirements for a valid judgment against an infant, says: "So careful is the law to guard the rights of infants, and to protect them against hasty, irregular, and indiscreet judicial action. Infants are in many cases the wards of the courts and these forms enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory and not directory only. Those who venture to act in defiance of them must take the risk of their action being declared void or set aside."

The judgment is void as against the plaintiff in this action not only because she was not a party to the action in which it was rendered. It appears upon its face that the judgment was rendered by consent of the

parties to the action. For that reason, if it be conceded that the plaintiff was a party defendant by virtue of the order of the court, and the appointment of the guardian *ad litem* for her, the judgment is void. It is well settled in this jurisdiction, at least, that in the case of infant parties, the next friend, guardian *ad litem,* or guardian cannot consent to a judgment against the infant, without an investigation and approval by the court. McIntosh North Carolina Practice and Procedure p. 721, *Keller v. Furniture Co.,* 199 N. C., 413, 154 S. E., 674, *Rector v. Logging Co.,* 179 N. C., 59, 101 S. E., 502, *Bunch v. Lumber Co.,* 174 N. C., 8, 93 S. E., 374, *Ferrell v. Broadway,* 126 N. C., 258, 35 S. E., 467. The judgment in this action is erroneous and for that reason is

Reversed.

STATE OF NORTH CAROLINA v. STANDARD OIL COMPANY OF NEW JERSEY, GULF REFINING COMPANY, THE TEXAS COMPANY, SINCLAIR REFINING COMPANY, THE AMERICAN OIL COMPANY, AND SHELL EASTERN PETROLEUM PRODUCTS, INCORPORATED.

(Filed 12 July, 1933.)

1. Courts A f—Appeal will not lie from one Superior Court judge to another.

A judgment sustaining a demurrer to the complaint for its failure to allege facts sufficient to constitute a cause of action is binding upon another Superior Court judge upon motion to strike out an amendment to the complaint filed under leave of the former judgment.

2. Appeal and Error C d—Where judgment is not appealed from it is not presented for review on appeal from subsequent order in the cause.

Where a judgment sustaining the demurrer for failure of the complaint to state a cause of action is not appealed from, the sufficiency of the complaint is not presented for review upon appeal from a subsequent order striking out an amendment to the complaint filed under leave of the judgment sustaining the demurrer.

3. Pleadings I a—Motion to strike out amendment held properly allowed, the amendment not being responsive to order allowing its filing.

In an action to declare illegal certain lease and commission contracts made by defendants on the ground that they were in contravention of C. S., 2559-2574, relating to monopolies and trusts, judgment was entered sustaining defendants' demurrer to the complaint on the ground that it failed to allege facts sufficient to constitute a cause of action in that a general averment was insufficient and the complaint failed to allege any understanding or agreement between defendants or any specific acts preventing independent competition or specific facts constituting a monopoly, and leave was given plaintiff to file an amendment within a

specified time. There was no appeal from the judgment. Plaintiff filed an amendment to its complaint alleging in general terms an agreement between defendants in restraint of trade. Defendants moved to strike out the amendment on the ground that it was not responsive to the order allowing the amendment: *Held*, the judge of the Superior Court hearing the motion to strike out was bound by the former judgment declaring that a general averment without allegation of specific facts was insufficient to constitute a cause of action, and his order allowing defendants' motion is affirmed.

CLARKSON, J., concurring.

APPEAL by plaintiff from *Cranmer, J.*, at February Term, 1933, of WAKE.

Civil action to declare illegal certain lease and commission contracts made by defendants respectively with various persons, firms, or corporations, under which the latter sell to the public the gasolines and lubricating oils marketed by the several defendants, and to enjoin the defendants, each and all, from further entering into such contracts on the ground that they are in contravention of C. S., 2559-2574, chapter 53, relating to monopolies and trusts.

Separate demurrers were interposed by the several defendants on the grounds (1) that there is a misjoinder of parties and causes; and (2) that the complaint does not state facts sufficient to constitute a cause of action.

At the November Term, 1932, the demurrers were overruled on the first ground and sustained on the second, with leave to amend within 30 days, Judge Sinclair presiding and finding:

"That the complaint alleges facts and circumstances, proof of which upon trial would be competent upon an allegation of an understanding or agreement among the defendants to create a monopoly or to restrain competition in violation of the statute, but that it does not allege any understanding or agreement, tacit or otherwise, by the defendants; neither does it sufficiently allege any specific acts which would of themselves constitute in law prevention of independent competition or amount to restraint in trade or commerce.

"In the absence of some allegation of a common understanding or agreement by the defendants in reference thereto, the business methods and processes in use by the defendants are not inconsistent with the idea of the common use of approved business methods in open competition by the defendants.

"There is no averment of any specific fact or facts, which of themselves would constitute a monopoly or the prevention of competition, and in the opinion of the court, an averment of a general conclusion is not sufficient to constitute a cause of action."

Within the time allowed an amendment to the complaint was filed in the form of an additional paragraph as follows:

"23. And in the said acts and things done and performed by the said defendants, as set out in the original complaint and the amendment thereto, the said defendants acted in concert and in pursuance of agreements, contracts, combinations and understandings, expressed or implied, and with a common purpose to control and raise the price of the commodities sold by them, and to restrain trade and commerce in the State of North Carolina in the sale and distribution of such petroleum products, and that said agreements, contracts, combinations and understandings, expressed or implied, by, between and among the said defendants, and each of them, were intended to, and did, operate to prevent open, free and independent competition in the sale and distribution of petroleum products in the State of North Carolina, and were intended to and did operate to control and increase the price of said petroleum products, to hamper, lessen and restrain trade and commerce therein, and were in restraint of free and lawful competition in the sale and distribution of such petroleum products in this State, and in violation of chapter 41, Public Laws of 1913, now chapter 53 of the Consolidated Statutes, and particularly sections 2559-2564 thereof."

Separate motions were thereupon filed by the several defendants to strike out said amendment "upon the ground that it is not responsive to said decision, judgment and order filed 12 November, 1932, in that there is contained therein no averment of any facts which would constitute a monopoly or the prevention of competition, and no averment of any specific fact or facts sufficient to remedy the defects in the complaint which was by the Hon. N. A. Sinclair adjudged not to state a cause of action."

It was further observed upon the argument of said motions that the amendment was not materially unlike paragraph 22 of the original complaint, which had previously been held insufficient on demurrer, and which said paragraph is as follows:

"22. By the processes and methods hereinbefore described, defendants, and each of them, have been able to establish, maintain, control and dictate the prices at which gasoline and other petroleum products are being sold in this State. Defendants simultaneously developed the methods and processes hereinbefore described and entered upon their prosecution in November, 1929, and each and all of them have since sought to place in effect the said exclusive sales contracts, as between each of them and gasoline filling station operators. By such acts, methods and processes, defendants, and each of them, have restrained and prevented free and independent competition in the sale of gasoline and other petroleum products in this State, and the methods and pro-

cesses so used by them, and the contracts and agreements hereinbefore set out and being put into effect by them, are in restraint of trade and commerce in gasoline and petroleum products in this State, and in violation of chapter 41, Public Laws of 1913, now chapter 53 of the Consolidated Statutes, and especially sections 2559-2564 thereof."

From a judgment allowing the motions of the defendants and ordering that the amendment be stricken out, the plaintiff appeals, assigning said ruling as error.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Siler for the State.

Pou & Pou for defendant, Standard Oil Company of New Jersey, and Clarence J. Shearn of counsel.

T. Lacy Williams and W. J. Guthrie for defendant, Gulf Refining Company.

Harry T. Klein and Murray Allen for defendant, The Texas Company.

Roy T. Osborn, H. P. Ragland and Jones & Brassfield for defendant, Sinclair Refining Company.

Edwin H. Brownley and Biggs & Broughton for defendant, American Oil Company.

Burnham, Bingham, Pillsbury, Dana & Gould and Fuller, Reade & Fuller for defendant, Shell Eastern Petroleum Products, Incorporated.

STACY, C. J. In the outset it should be observed that the judgment of Judge Sinclair, sustaining the demurrers to the original complaint on the ground that it did not state facts sufficient to constitute a cause of action, was not before Judge Cranmer for review. He could not question its correctness, but was bound by its terms. No appeal lies from one Superior Court judge to another. *S. v. Lea,* 203 N. C., 316, 166 S. E., 292; *Revis v. Ramsey,* 202 N. C., 815, 164 S. E., 358. Nor is the judgment sustaining the demurrers before us for review. There was no appeal from said judgment. *Willoughby v. Stevens,* 132 N. C., 254, 43 S. E., 636. The only question presently presented is the correctness of the ruling striking out the amendment.

In considering the motions to strike out the amendment, the judge was not only faced with the holding that the original complaint, which contains paragraph 22, did not state facts sufficient to constitute a cause of action, but was also under the necessity of observing the terms of the judgment allowing the plaintiff to amend. *Dockery v. Fairbanks,* 172 N. C., 529, 90 S. E., 501. There, it was said an averment of a general conclusion would not suffice unless predicated upon allegation of some "specific fact or facts, which of themselves would constitute a monopoly

or the prevention of competition." True, it is alleged in the amendment that the defendants acted in concert and in pursuance of agreements, combinations and understandings, with a common purpose to control and raise the prices of commodities sold by them, which prevented competition, but it had already been held that the previous allegations of fact were not sufficient to support a similar conclusion.

His Honor concluded, therefore, as the original complaint did not state facts sufficient to constitute a cause of action, according to the prior ruling, which was binding on him, the only responsive amendment would be one stating such facts, or stating facts which added to those in the original complaint would be sufficient to constitute a cause of action; and that since the amendment omitted to state the facts previously pointed out as essential, it was not responsive to the order allowing it. In this, we perceive no error. It is not open to the plaintiff to say the original complaint does state facts sufficient to constitute a cause of action, for the judgment sustaining the demurrers, unappealed from, forecloses this position. *Swain v. Goodman,* 183 N. C., 531, 112 S. E., 36; *Marsh v. R. R.,* 151 N. C., 160, 65 S. E., 911.

Affirmed.

CLARKSON, J. I concur in this opinion, as the case presents a question of pleading and practice.

JERRY FLORENCE JOHNSON, ADMINISTRATRIX OF LUCIUS D. JOHNSON DECEASED, v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 July, 1933.)

1. Death B d—

In an action for wrongful death the burden is on plaintiff to establish by adequate evidence the death of the intestate, the defendant's negligence, and proximate cause.

2. Railroads D b—Duty of railroad company to ring bell, sound whistle and keep lookout at populous crossing.

It is the duty of a railroad company to exercise due care to keep a careful lookout at a populous grade crossing, and to warn of the approach of its trains thereto by ringing the bell or sounding the whistle, or both, the degree of vigilance required being in proportion to the apparent danger.

3. Same—

The violation of a town ordinance regulating the speed of trains within its limits is negligence *per se,* the ordinance being intended to prevent injury to person and property.

4. Same—Evidence of causal relation between railroad's negligence at crossing and injury held sufficient to be submitted to jury.

In order for negligence to be actionable it is necessary that it should be the proximate cause of the injury in suit, and where there is any sufficient evidence of causal relation the question is for the jury, otherwise it is for the court, and the evidence in this case tending to show that plaintiff's intestate was riding in a car driven by the owner, that the car stopped at a crossing within the corporate limits of a town while a southbound train passed on one track and that the driver then went upon the tracks and that the rear wheel of the car was struck by a northbound train passing on a second track, together with other evidence, *is held* sufficient evidence of the causal relation between defendant's negligence in exceeding the speed limit prescribed by the town ordinance and its negligence in failing to give warning of the approach of its train to the populous crossing by ringing its bell or sounding its whistle.

5. Evidence N c—Negative testimony held to raise issue for jury although another witness gave positive testimony to contrary.

Where one witness testifies that he heard defendant's train sound its whistle, and another witness testifies that he was in a position to have heard such signal had it been given, and did not hear the whistle, the affirmative testimony is ordinarily more reliable than the negative, but such testimony is some evidence that the whistle was not blown.

6. Automobiles C j—Negligence of driver will not be imputed to guest unless guest is in common possession of car with driver.

In an action against a railroad company for the wrongful death of plaintiff's intestate, killed in a collision between defendant's train and the automobile in which the intestate was riding as a guest, the plaintiff is entitled to recover if the negligence of the railroad company was the proximate cause of the collision, or one of the proximate causes thereof, if the intestate was not guilty of contributory negligence, and the negligence of the driver of the car will not be imputed to the guest unless he had such joint control over the car as to have it in common possession with the driver.

7. Same—Defendant has burden of proving that guest in car failed to use due care for his own safety.

The burden is on defendant to prove the contributory negligence of a guest riding in an automobile in an action by the guest's administrator to recover for his wrongful death, and where plaintiff's evidence fails to show that the guest did not warn the driver of the impending danger of the collision resulting in the injury, or did not protest or take any action to prevent the collision, and fails to show that the guest saw defendant's approaching train and that the driver did not see it, an instruction to answer the issue of contributory negligence in the negative is correct.

APPEAL by defendant from *Shaw, Emergency Judge,* at August Term, 1932, of HALIFAX. No error.

This is an action to recover damages for the death of the plaintiff's intestate alleged to have been caused by the negligence of the defendant.

In the afternoon of 15 January, 1932, between six and seven o'clock, an automobile owned and driven by Walter G. Young, in which the plaintiff's intestate was riding as a guest, was struck by an engine of the defendant at a grade railroad crossing in the town of Enfield, and both occupants of the car were killed.

The automobile was a one-seated coupe, the driver sitting at the wheel on the left and the plaintiff's intestate on the right. At the place of collision the defendant maintains two contiguous railroad tracks extending north and south, southbound trains using the west track and northbound trains using the east track. About 75 yards south of the crossing there is a switch or spur track on which some cars were standing at a distance of 70, 80, or 90 yards from the scene of the accident.

Burnette Avenue, 27 feet wide, crosses the two railroad tracks and runs east and west. It is used by the public; probably 100 or 150 automobiles and other vehicles pass over the crossing during the day and night. On each side of Burnette Avenue is a sidewalk about four feet and a half in width. On the west side of the crossing an extension of Main Street runs north and south, parallel with the railroad tracks, the distance from the sidewalk to the southbound track being about 40 feet. It is 6 feet from the southbound to the northbound track.

Only two witnesses testified to the material facts relating to the collision, Ben Dunn and Stephen Sneed. The former said: "I was standing on the east side of the track about 35 or 40 yards from the crossing. . . . It was about good dark. One train had passed up to the next crossing and one was coming. . . . The southbound train had passed 85 yards south of the crossing when the northbound engine and caboose came together. I was not looking to the west when the trains passed. I was just noticing the trains and looking at them when coming down the sidewalk, and heard the northbound man blow a crossing blow a good big block away. . . . Just as soon as the southbound train passed, I looked and saw the automobile easing toward the track, the northbound train was about 85 yards. This train was running about 40 miles per hour. I did not hear a bell, did not hear anything but a crossing blow a block away, about 125 or 150 yards. When the northbound train blew, the caboose of the southbound man had not gotten quite in contact with the engine of the northbound man when it blew for the crossing. I do not think the northbound train slowed down at all before the collision. The train hit the right-hand rear wheel of the automobile, twisting it around and turned it over twice, and of the two men in it, one was killed instantly; one was knocked out and the other was hanging. The train ran one and one-half blocks before it stopped, about 125 yards. The brakes were put on by the engineer as soon as he hit the men. There was no electric signal or electric gong, only a cross-

arm to indicate there was a crossing, just like you see at any other crossing. When I saw the automobile approaching the crossing, it was running 8 or 10, not over 10 miles an hour, very slowly. The automobile was 46 feet from the northbound track on which it was struck when I first saw it. . . . Between the time I saw the northbound engine pass the southbound caboose and when I saw the car easing into Main Street, I walked 15 yards. When I saw the train coming and the automobile approaching that street crossing, going across Main Street, I hollered at the man: 'Hey, there's a train coming.' I don't think he heard me as he did not regard what I said. The door of the car was not open; no one attempted to get out; its speed did not slacken or increase and it did not swerve to the right or left. The headlight of the northbound train was burning brightly, and the whistle sounded for the regular crossing blow for Burnette Avenue where they usually blow. When I hollered at the driver of the car, it was moving along. There was no other noise in the immediate vicinity besides the sound of my voice and the noise of the train which I reckon was a 40 or 45 car freight train. I did not see anybody in the car at the time I hollered to them, or at the time I was approaching the crossing, nudge the driver; nor did I see them raise their hands or point to the train."

Stephen Sneed was on the east side of the railroad, intending to cross the track in his car when he saw the approaching train. He testified: "When I did look at the crossing I saw this car on the other side coming towards me. When I took my eyes off the train and looked back at the crossing, the man was right between the four rails coming towards me when I looked the second time. At that time the northbound train was up the track from the automobile as far as from here to the back door (of the courthouse). I looked back again at the train and it was easing up on it, and . . . it struck the back of the car at the fender, right at the wheel. It knocked it around and turned it over, it seemed to me, twice. . . . It was dark where the car was . . . the brakes were put on after the train hit the car. I could not see that the train slowed down any before it hit the car . . . it was running around 35 miles an hour or perhaps more. I did not hear any bell or whistle and there was not any electrical signal or watchman to warn anybody at the crossing. I stopped on the other side; was not directly in the street. . . . I could have heard whistle if it had blowed; my engine could not keep enough fuss to keep me from hearing it. I heard the train coming, saw the headlight, and stopped my car for it to pass. . . . When I first looked the car was on the concrete, had not entered the track. I judge the train was 75 feet or more coming to the crossing. . . . There was not a thing between the car and the train to keep the driver from seeing the train. When he was back ten feet further, there

was nothing between him and the train to keep him from seeing the train . . . he could have seen that headlight."

The plaintiff offered in evidence an ordinance of the town of Enfield making it unlawful for any railroad or railway company to run its trains through the corporate limits of the town at a greater rate of speed than 15 miles an hour, except between the hours of 10 p.m. and 6 a.m. The defendant did not introduce any witnesses.

The usual issues of negligence, contributory negligence, and damages were answered against the defendant. Judgment for plaintiff; appeal by defendant upon assigned error.

George C. Green and Thos. W. Ruffin for plaintiff.

Thos. W. Davis, Dunn & Johnson and Spruill & Spruill for defendant.

ADAMS, J. The defendant suggests that two inquiries with their necessary implications are sufficient to present the merits of the appeal:

1. Did the court err in overruling the defendant's motion to nonsuit the action at the close of the evidence?

2. If the demurrer to the evidence was properly overruled, did the court err in peremptorily instructing the jury to answer the issue of contributory negligence in the negative?

The first inquiry raises the two questions whether there is evidence of the defendant's actionable negligence and whether there is evidence of such contributory negligence on the part of the plaintiff's intestate as will bar the recovery of damages; the other has reference to the court's withholding from the jury the question of negligence on the part of the intestate.

The trial court restricted the consideration of the jury to three alleged acts of negligence: (a) the defendant's failure to give timely warning of the incoming train as it approached the crossing; (b) its failure to keep a proper lookout; (c) its operation of the train within the corporate limits of the town at a rate of speed in excess of fifteen miles an hour.

It was incumbent upon the plaintiff to establish by adequate evidence the actionable negligence of the defendant—the death of the intestate, the defendant's negligence, and the proximate causal relation; and the sufficiency of the evidence in these respects must be determined by appropriate principles of law.

As the crossing at which the collision occurred is habitually used it was the duty of the defendant in the exercise of reasonable care to keep a careful lookout for danger and to give timely notice or warning of the approach of the train by sounding the whistle or by ringing the bell, or by doing both if necessary, the degree of vigilance being in proportion to the apparent danger. Failure to exercise due care in these respects

would constitute negligence which if the proximate cause of the intestate's death would be actionable. *Collett v. R. R.,* 198 N. C., 760; *Redmon v. R. R.,* 195 N. C., 764; *Riggsbee v. R. R.,* 190 N. C., 231; *Costin v. Power Co.,* 181 N. C., 196; *Bagwell v. R. R.,* 167 N. C., 611; *Johnson v. R. R.,* 163 N. C., 431; *Edwards v. R. R.,* 132 N. C., 100.

The ordinance that the plaintiff offered in evidence was obviously intended to prevent injury to person and property and its violation by the defendant was negligence *per se. King v. Pope,* 202 N. C., 554; *S. v. Durham,* 201 N. C., 724; *Lancaster v. Coach Co.,* 198 N. C., 107; *Burke v. Coach Co., ibid.,* 8; *Ledbetter v. English,* 166 N. C., 125. Of course the failure to observe the ordinance, similarly to the failure to keep a lookout or to give notice that the train was approaching, would not make a case of actionable negligence in the absence of evidence tending to show that it was the proximate cause of the intestate's death. If there is evidence in support of the alleged proximate causal result the question was properly submitted to the jury; if not, it should have been determined as a question of law. *Albritton v. Hill,* 190 N. C., 429. The defendant insists that it was not negligent in any view but, if it was, that there is no sufficient causal connection between its negligent act and the death of the intestate. We are of opinion that there is evidence of such causal relation, and that it differs materially from the evidence in *Hendrix v. R. R.,* 198 N. C., 142 and *Thompson v. R. R.,* 195 N. C., 663.

Only two witnesses testified as to the signals. Ben Dunn said, "I heard the northbound man blow a crossing blow a good big block away . . . I did not hear a bell; did not hear anything but a crossing blow a block away, about 125 or 150 yards." Sneed testified, "When I got within 25 or 30 feet of the track I stopped my automobile . . . I did not hear any bell or whistle . . . my engine was running until the train got close to me and I cut my engine off then. I could have heard the whistle if it had blown; my engine could not keep enough fuss to keep me from hearing it."

These two witnesses testified in behalf of the plaintiff. The testimony of one is affirmative and that of the other is negative. While the affirmative testimony of a credible witness is ordinarily more reliable than the negative testimony of an equally credible witness, still testimony that a person near by who could have heard and did not hear the sounding of the whistle is some evidence that no such signal was given. *Earwood v. R. R.,* 192 N. C., 27; *Perry v. R. R.,* 180 N. C., 290; *Goff v. R. R.,* 179 N. C., 219. The charge pointed out the distinction between these two types of evidence and this Court cannot decide as an inference of law which of the two the jury accepted. If the defendant did not give the signal it would not be unreasonable to conclude that its failure in this respect was the proximate cause or one of the proximate causes of the collision.

The speed of the train, also, may have been considered as an element or cause contributing to the result. The engine struck the right-hand rear wheel of the automobile, not having "slowed down at all" prior to the impact. There is evidence from which the jury may reasonably have inferred that if the defendant had observed the ordinance and had reduced the speed from thirty-five or forty to fifteen miles an hour the car would have emerged from the zone of danger and the collision would not have occurred.

The trial court clearly instructed the jury in regard to all the elements essential to an affirmative answer to the first issue—the sole negligence of the defendant, the sole negligence of the driver of the car, the concurrent negligence of both, and the necessity of causal relation between the defendant's negligence and intestate's death; and as to this issue we find no error.

In reference to the second issue the defendant contends that according to the entire evidence the plaintiff's intestate was himself guilty of contributory negligence which defeats the right of recovery.

The intestate was not the owner of the car; he had no control over it; and there is no evidence that he and the driver were engaged in a joint enterprise. They were engaged in the common enterprise of riding but they had no such joint control and direction over the automobile as to have it in their common possession. *Albritton v. Hill, supra.*

We have held that where two proximate causes contribute to an injury the defendant is liable if his negligent act brought about one of such causes and that negligence on the part of the driver of a car will not ordinarily be attributed to another occupant. *Smith v. R. R.,* 200 N. C., 177. These propositions were definitely stated in the charge; but they do not imply that "another occupant" of a car may not be negligent. In *Earwood v. R. R., supra,* it was said that the negligence of the driver was not imputable to a guest because there was no evidence of a joint enterprise or that the guest had any control of the car or had failed to perform any duty imposed upon him by law. In *Smith v. R. R., supra,* the duty imposed upon the guest is stated as follows: "Conceding it was his duty, although merely a passenger in the automobile, with no control over the driver, to keep a reasonable lookout for engines and trains on defendant's track, as the automobile approached the crossing, and to warn the driver of the impending danger of a collision, if it was apparent to him that the driver had not seen the engine and tender or having seen them, did not appreciate the danger of a collision, it cannot be held that all the evidence upon this aspect of the case showed that Boyd Smith failed to perform this duty, and that such failure was a proximate cause of the collision resulting in his death. If he saw, or by the exercise of reasonable care, could have seen no more than the driver and his fellow-passenger, who were under a like

duty, saw, it was for the jury and not for the court to determine whether or not, under all the circumstances, he contributed to his death by his own negligence. If when he saw, or by the exercise of reasonable care, could have seen that an engine and tender on defendant's track was approaching the crossing, he also saw that the driver had seen the approaching engine and tender, and with full appreciation of the impending danger, was doing all in his power, under the circumstances, to avoid a collision, it was for the jury and not for the court to say whether or not his failure to speak to the driver and warn him of the danger was negligence. It is a matter of common knowledge to those who ride in automobiles—certainly to those who drive them—that 'backseat' driving often confuses a driver, and more often than otherwise, prevents him from avoiding dangers encountered on the road." 200 N. C., 181.

The defendant had the burden of showing the contributory negligence of the intestate as a proximate cause of the injury and death—that is, that the intestate failed to exercise ordinary care and that his death was the proximate result of his negligence. In applying to the evidence the principle stated in *Smith v. R. R., supra,* the defendant says: "The guest not only did not warn the driver or make any protest, but did not himself take any steps to avoid the injury."

We are unable to concur with the defendant in this construction of the evidence. A careful inspection of the testimony fails to disclose any proof that the guest did not warn the driver or make any protest or take any action to prevent the collision. It fails to show, as stated in the *Smith case,* that it was apparent to the intestate that the driver did not see the train and did not appreciate the danger. It was probably upon this theory that the court held there was no sufficient evidence of contributory negligence.

After due consideration of all the exceptions appearing in the defendant's brief we find

No error.

E. W. SWEET, TRADING AND DOING BUSINESS AS E. W. SWEET YARN COMPANY, v. ACME SPINNING COMPANY.

(Filed 12 July, 1933.)

1. Brokers E c—Evidence held to show that broker had received all commissions due under brokerage contract.

Where in an action to recover commissions the broker testifies that he was to receive a certain per cent on all sales made when ratified by defendant and that he had received commission on all such sales except the sale in suit, and it appears from the evidence that defendant refused to ratify the sale in suit on grounds stipulated in the contract to be passed upon by defendant, the broker is not entitled to recover.

2. Pleadings J c—Held, defendant waived objection that special contract had not been pleaded by introducing evidence relating to issue.

Where a broker in his complaint alleges a general contract and upon the trial sets up the general contract and a special contract between the parties, and both parties fight out both phases of the case with evidence, defendant may not maintain that the complaint failed to sufficiently allege the special contract.

3. Brokers D a—Evidence held to show that sales contract was never consummated and broker was not entitled to recover commissions.

Where in an action by a broker to recover commissions alleged to be due on sales made by him he introduces evidence that he negotiated a contract between defendant and another providing for the sale of a certain quantity of goods, but it appears from the evidence that the contract provided that it should not be effective until signed by defendant, and that it was never signed, and plaintiff testifies that defendant told him over the telephone that the proposed contract of sale would have to be approved by his board of directors, and the uncontradicted evidence discloses that the board of directors expressly refused to approve the contract, the evidence discloses that no binding contract of brokerage had been consummated, and plaintiff is not entitled to recover.

CIVIL ACTION, before *Cowper, Special Judge,* at January Term, 1933, of ALAMANCE.

The plaintiff is engaged in the brokerage business for the sale of yarns and maintains his office in Burlington. The defendant is engaged in the manufacture and sale of fine combed yarns, with its principal office at Belmont, North Carolina. On 12 September, 1928, the plaintiff and the defendant entered into a brokerage contract in writing which provided that the plaintiff was to sell yarns for the defendant "at a commission of two per cent of the amount of invoices and goods sold by E. W. Sweet Yarn Company, and two per cent commission on all goods shipped by repeat orders or orders from original orders." . . . Said written agreement further provided: "It is hereby mutually agreed that this agreement is for an unlimited time and may be terminated or canceled by either party . . . upon written notice of sixty days to the other party."

In 1931 the plaintiff instituted this action against the defendant in the General County Court of Alamance County. The complaint, after referring to the brokerage contract heretofore mentioned, alleged "that during the existence and continuance of the aforesaid contract and agreement the defendant, Acme Spinning Company, through its representatives, approached the plaintiff with a view to securing larger sales within the territory allotted to the plaintiff. That the defendant was very anxious to increase its sales in said territory and after considerable discussion with the plaintiff it was agreed that it would be necessary for some arrangements to be made whereby the product of the defendant

company should be mercerized. That the plaintiff thereupon agreed to find a concern that should mercerize the product of the defendant and thus permit it to increase its sales within said territory. That pursuant to this agreement the plaintiff approached the Ideal Mercerizing Company, a corporation engaged in the mercerizing business in the city of Burlington and proposed to it that it purchase from the Acme Spinning Company certain quantities of yarn which were to be mercerized and then sold by the plaintiff. That this proposition appealed to the Ideal Mercerizing Company and to the Acme Spinning Company, and each of said companies thereupon entered into a contract and agreement whereby the Ideal Mercerizing Company should purchase and the Acme Spinning Company should sell a certain amount of yarns upon which this plaintiff was to receive a commission of two per cent. . . . That it was agreed between the Ideal Mercerizing Company and the Acme Spinning Company and this plaintiff that the arrangement aforesaid should continue for a period of two years and that the Acme Spinning Company should sell and the Ideal Mercerizing Company should purchase at least 20,000 pounds of yarn per week. It was further understood and agreed that the commissions on the annual sales thereby secured should amount to the sum of at least $10,000 per year. . . . That pursuant to said agreement the Ideal Mercerizing Company immediately placed with the Acme Spinning Company an order for one hundred thousand pounds of yarn as an initial order," etc. The plaintiff further alleged that the defendant failed to fill said order or to sell any yarn to the Ideal Mercerizing Company and thereby breached the contract, thus preventing the plaintiff from securing his two per cent commission on all sales.

The defendant answered, setting up the brokerage contract of September, 1928, and alleging that on 4 March, 1930, in accordance with the terms of said contract the defendant had terminated said agreement and paid the plaintiff all commissions due him upon all sales which he had made during the existence of the agreement. The defendant further alleged "that in February, 1930, the plaintiff had approached it with a proposition whereby this defendant and Ideal Mercerizing Company should enter a contract whereby Ideal Mercerizing Company should mercerize and finish large quantities of defendant's yarn from time to time. Plaintiff drew up and forwarded defendant a contract for its signature, but the terms of this contract were unsatisfactory to defendant, and both the plaintiff and Ideal Mercerizing Company were promptly notified that the defendant could not enter into or agree to the terms and conditions of the offer for the reason that the terms and methods of financing the proposition were entirely unsatisfactory."

The plaintiff testified that there was a written contract between the defendant and himself, made in 1928, whereby he was to receive a commission of two per cent on yarns sold for the defendant, and that he approached the president of the Ideal Mercerizing Company of Burlington with reference to mercerizing yarns manufactured by the defendant, and that Suggs, secretary and treasurer of the defendant, and Phillips, president and treasurer of the Ideal Mercerizing Company, entered into negotiations for the purpose of arriving at a satisfactory agreement whereby the Mercerizing Company should mercerize yarns manufactured by the Spinning Company, and such yarns to be sold by the plaintiff. The proposition contemplated that the defendant, Spinning Company, should sell and deliver to the Mercerizing Company approximately 20,000 pounds of yarn per week for a period of two years. At that time the average price on yarn was about fifty cents a pound. The terms were three per cent—30 days—on each 100,000 pounds order. Plaintiff said: "The line of credit that the Ideal Mercerizing Company wanted under my proposed arrangement was approximately $90,000 or $100,000. In order to secure such line of credit it was proposed that the Ideal Mercerizing Company should give a mortgage on its plant for $25,000." The plaintiff prepared a contract and deed of trust embodying the proposition in detail, and the contract was duly signed by the Ideal Mercerizing Company and forwarded to the defendant for signature. The defendant refused to sign the contract or to accept the deed of trust, contending that the proposed agreement was not satisfactory for that: (1) The amount of credit to be extended by the defendant to the Mercerizing Company was enormous, amounting to $40,000 or $50,000 a month, and further that the Mercerizing Company was a new concern listing real and personal property for taxes in the year 1930 in the sum of $31,867, and consequently its financial position did not justify such a large line of credit as the proposed agreement contemplated. The proposed agreement was to be submitted subject to the approval of the board of directors of the defendant.

The plaintiff testified: "Nothing was said to me by Mr. Suggs in reference to the approval of his board of directors to the contract or deed of trust. The problem of the directors was brought up when I first talked the situation over with Mr. Suggs in Belmont." However, the proposed contract in paragraph 9 thereof stipulated: "This contract shall become in force from the day of its signing," etc. All the evidence shows that it was never signed by the defendant. With reference to the right of the defendant to pass upon credit risks, plaintiff said: "As a matter of sales of this kind and on brokerage the selling company reserves the right always to determine the desirability of the purchaser as to a credit risk on its rating and ability to pay, the terms of the contract

and all of those particulars. That was true with my relation with the Acme Spinning Company. . . . At the time I called Mr. Suggs over the telephone about this matter to which I have referred or at one of the times he stated to me that any proposition that was made by the Ideal Mercerizing Company, looking to such arrangements as was being proposed, would have to be submitted to and approved by his board of directors." The uncontradicted evidence is that the board of directors of the defendant refused to approve the proposed agreement and so notified the Mercerizing Company. Plaintiff further said: "I was to receive two per cent commissions on the sales of such yarns of the Acme Spinning Company as I sold when sales were ratified by it, and I have received two per cent commissions on all orders that were sold and ratified except the contract in question. I have already admitted that I have never received any acceptance by way of accepted copy of this order or invoice, or otherwise from the Acme Spinning Company on this billing which I rendered them."

The following issues were submitted to the jury in the county court:

1. "Did plaintiff and defendant enter into an agreement or contract as alleged in the complaint?"

2. "Did the plaintiff bring about and procure a contract or agreement between the defendant, Acme Spinning Company and Ideal Mercerizing Company for the sale of approximately 20,000 pounds of yarns per week by Acme Spinning Company to Ideal Mercerizing Company, such account to be secured to the extent of $25,000 by deed of trust on the properties of Ideal Mercerizing Company over a period of two years, as alleged in the complaint?"

3. "Did the defendant breach its said contract with the plaintiff, as alleged in the complaint?"

4. "What damage, if any, is the plaintiff entitled to recover of the defendant, Acme Spinning Company?"

The jury answered the first issue "Yes," the second issue "Yes," the third issue "Yes," and the fourth issue "$3,000."

Judgment was entered upon the verdict. The defendant made a motion to set aside the verdict and the judge of the county court made the following entry: "The defendant, in apt time, made its motion to set aside the verdict in this cause, for errors committed and assigned and to be assigned, and among other errors assigned and argued before the court, was the alleged error that the complaint of plaintiff did not allege a new, special and independent contract between the plaintiff and defendant for the particular sale of the products of the defendant to the Ideal Mercerizing Company, with authority to conclude such sale, but that the allegations of said complaint alleged the original contract of brokerage entered into between plaintiff and defendant on or about 12

September, 1928, and that all allegations of said complaint with reference to the contract between the plaintiff and defendant were consistent with and referred to said contract, and that the defendant had based its entire defense upon the said contract of brokerage, and the failure of the plaintiff to secure an order or orders supported by a special contract securing such orders from Ideal Mercerizing Company, that the defendant could accept. The facts set forth in the foregoing affidavit were presented to and argued to the court, and the court directed that the defendant be allowed to file this affidavit in support of its motion to set aside the verdict, and for a new trial. The court itself did not understand that the plaintiff was alleging a new or special contract with reference to said transactions, until he understood counsel of plaintiff to state in the process of the trial that he was not relying upon the original contract, but upon the new contract. The defendant is permitted to file this affidavit in this cause."

Upon the hearing in Superior Court upon exceptions filed, the trial judge signed a judgment containing the following: "The plaintiff contends in this case that he has alleged a special contract independent of and not connected with the brokerage contract alleged. The defendant, on the other hand, contends that the only contract alleged in the complaint is the brokerage contract. Keeping in mind that the purpose of every complaint is to inform the defendant clearly of the grounds upon which it is being sued, . . . it will be noticed in paragraph 3 of the complaint it is alleged that the plaintiff was under a brokerage contract with the defendant, and was to receive two per cent brokerage on sales thereunder. Plaintiff alleged 'during the existence and continuance of the aforesaid contract' certain transactions took place, which on their face are entirely consistent with the written brokerage contract. . . . It is the opinion of the court that the complaint is not clear, but is very confusing. . . . At best, if construed to allege a special agreement, it would leave two contracts between the same parties in force, covering practically the same subject-matter. . . . The conclusion of the court is that, properly construed, the complaint does not allege a special agreement independent of and not connected with the written contract declared on in paragraph 3 of the complaint. . . . The special contract contended for by the plaintiff, not having been sufficiently alleged in the complaint, the evidence of the plaintiff does not disclose any breach of the contract of brokerage as alleged, or any damages suffered thereunder, and the judge of the General County Court should have sustained defendant's motion for judgment as of nonsuit. . . . If the complaint were sufficient to set up and allege an additional special contract, then is there sufficient competent evidence to justify the submission of an issue as to the said special

contract to the jury? A careful reading of the pleadings, together with a consideration of the evidence, will, the court thinks, make it apparent that the minds of the said two contracting parties did not meet in such a special contract. . . . My conclusion as to this phase of the case is: Even granting the complaint is sufficient in its allegations of the special contract as claimed by the plaintiff, there is no sufficient competent evidence to justify the submission to the jury of an issue as to the alleged special contract and the breach of the same. . . . It is therefore ordered, adjudged and decreed that the judgment heretofore entered in this cause in the General County Court be reversed, and that this case be remanded to the General County Court, and the judge thereof will enter a judgment as of nonsuit herein, as hereby directed."

From the foregoing judgment the plaintiff appealed.

John J. Henderson and Edwin H. Pearce for plaintiff.
Long & Long and H. B. Gaston for defendant.

BROGDEN, J. The plaintiff built his cause of action upon two theories:

First, a general contract of brokerage entered into with the defendant in 1928, which provided that a commission of two per cent would be paid on all sales made by the plaintiff for the defendant and approved by it.

Second, that a special agreement was entered into whereby the plaintiff procured the Ideal Mercerizing Company to purchase 20,000 pounds of yarn per week from the defendant upon certain terms and conditions, and that plaintiff was to receive two per cent commission on such sales.

The defendant resisted recovery upon two grounds:

First, that the plaintiff in his complaint had alleged a general contract of brokerage and was seeking to recover on a special contract not sufficiently pleaded.

Second, that the plaintiff was not entitled to recover in any event for that (a) the defendant had paid the plaintiff all sums due him on the regular brokerage contract of 1928, which payments were admitted by the plaintiff on the trial; (b) that the special contract proposed had never been approved or executed by the defendant, and that the directors of defendant had expressly refused to enter into such an agreement and had so notified the Ideal Mercerizing Company.

Manifestly, the plaintiff cannot recover upon his first or general brokerage contract. He said: "I was to receive two per cent commission on the sales of such yarns of the Acme Spinning Company as I sold, when sales were ratified by it, and I have received two per cent commission on all orders that were sold and ratified except the contract in question." Consequently the plaintiff goes out of court on his regular brokerage contract of 1928.

The inquiry must, therefore, shift to the status of the alleged special contract with the Ideal Mercerizing Company. The defendant strenuously asserts that no special contract was sufficiently pleaded. Indeed, the judge of the General County Court made an entry declaring that "the court itself did not understand that the plaintiff was alleging a new or special contract with reference to said transaction until he understood counsel of plaintiff to state in the progress of the trial that he was not relying upon the original contract, but upon the new contract." The judge of the Superior Court held the view that the special contract relied upon was not properly pleaded. However, the defendant offered evidence tending to meet and overthrow the alleged special contract, and, therefore, it would seem that the question as to whether such special contract was alleged, becomes an academic question. Both parties fought out both phases of the case with evidence. Hence the determinative question is whether there was any evidence tending to show that the special contract was consummated or resulted in a binding agreement. The pertinent decisions in this State speak plainly and definitely upon the method of establishing a contractual relation. They declare that a contract is not to be ascertained by what either one of the parties thought it was, but by what both agreed it should be. The law proceeds not upon the understanding of one of the parties, but upon the agreement of both. *Prince v. McRae,* 84 N. C., 674; *Lumber Co. v. Lumber Co.,* 137 N. C., 436; *Lumber Co. v. Boushall,* 168 N. C., 501; *Overall Co. v. Holmes,* 186 N. C., 428.

Applying the accepted legal principle to the facts, it appears from the evidence: (a) that the proposed form of contract specified that "this contract shall become in force from the day of its signing." It was never signed. (b) Plaintiff testified: "At the time I called Mr. Suggs over the telephone about this matter to which I have referred, or at one of the times, he stated to me that any proposition that was made by the Ideal Mercerizing Company looking to such arrangement as was being proposed, would have to be submitted to and approved by his board of directors." The uncontradicted evidence is that the board of directors of defendant expressly declined to approve the proposal submitted to the plaintiff and the Mercerizing Company and refused to proceed further with the negotiations. Therefore, the negotiations between the parties did not head up into a binding agreement, and the plaintiff cannot recover for the breach of a contract which never existed either in fact or in legal contemplation.

Affirmed.

STATE ON RELATION OF L. D. MEADOR v. JOHN S. THOMAS.

(Filed 12 July, 1933.)

1. Courts B a—Establishment of county court by commissioners under provisions of statute held not unlawful exercise of legislative power.

The establishment of a General County Court by the board of commissioners of a county under the provisions of chapter 216, Public Laws of 1923, and section 2(24-a), Public Laws of 1924, will not be held invalid as being an unlawful exercise of legislative power, the jurisdiction of such courts being prescribed by the Legislature and the board of commissioners being clothed merely with the power to find the facts in regard to the necessity and expediency of such court, and their acts in establishing such courts having been ratified by the Legislature.

2. Same — Legislature may delegate authority to elect judges of county courts to county commissioners.

Under the provisions of Art. IV, sec. 30, of our Constitution the Legislature is authorized to provide for the election of officers and clerks of General County Courts established by it, such courts being "other courts inferior to the Supreme Court" referred to in Art. IV, secs. 2 and 14, and the word "election" does not necessarily import a popular election by the qualified electors, and the delegation of the power to elect judges of the general county courts to the county commissioners is not an unlawful delegation of legislative power, and where such judge is elected by the commissioners upon a majority ballot it is immaterial whether their choice be called an appointment or election, the selection being made by the commissioners by ballot in accordance with the delegation of power to them.

APPEAL by plaintiff from *Barnhill, J.*, at Chambers, 10 March, 1933. From ALAMANCE.

Civil action in the nature of *quo warranto* to try the title to the office of judge of the General County Court of Alamance County, heard on the following agreed statement of facts:

1. Plaintiff is a duly licensed attorney at law, practicing in the courts of this State, and is a taxpayer living and residing in the city of Burlington, in Alamance County.

2. The defendant is a duly licensed attorney at law, practicing in the courts of this State only in such matters as the laws of the State permit a judge of a General County Court organized under chapter 216, Public Laws of 1923, and acts amendatory thereof to practice in; and the defendant is a taxpayer living and residing in the city of Burlington, in Alamance County.

3, 4, 5, 6, 7. At regular meetings of the board of commissioners of Alamance County held in the courthouse in Graham the following proceedings were had: (a) On 5 May, 1926, the board "elected" the

judge of the county court for a period of two years; (b) on 15 May, 1928, it "appointed" the judge for a like term; (c) on 5 May, 1930, it "elected or appointed" him for the ensuing term; (d) and on 2 May, 1932, when the ballots were counted the defendant was declared "elected" for two years beginning 1 July, 1932.

8. That from and after 1 July, 1926, said General County Court has been presided over continuously by a judge chosen by the board of commissioners of Alamance County and that on or about 1 July, 1932, the defendant took the oath of office as judge of the General County Court of Alamance County and began the performance of the duties of said office and has ever since been and is now presiding over said General County Court as the judge thereof at all its terms of court.

9. That at no time have the board of commissioners of Alamance County passed any resolution directing that the judge of the General County Court for Alamance County shall be elected by the qualified electors of the county or otherwise than by the board of commissioners themselves.

10. That in relation to plaintiff's claim of election by the qualified voters as judge of the General County Court for Alamance County, the following things were done:

(a) The plaintiff filed with the board of elections of Alamance County on ..... May, 1932, notice that he was a candidate on the Democratic ticket for judge of the General County Court of Alamance County.

(b) The board of elections of Alamance County caused plaintiff's name to be printed on the primary ballots voted in the Democratic primary, duly held on 4 June, 1932 (although there was no other person who had filed notice of candidacy) under the heading "Judge of the General County Court," and ..... such ballots marked so as to indicate plaintiff as the voters' choice for judge of the General County Court were cast in said primary election.

(c) The board of elections of Alamance County, subsequent to the time of holding said primary election, declared plaintiff nominated as Democratic candidate for judge of the General County Court of Alamance County.

(d) The board of elections of Alamance County caused plaintiff's name to be printed on the ballots for the general election of county officers of Alamance County on 8 November, 1932, under the heading "Judge of the General County Court," and ..... such ballots marked so as to indicate plaintiff as the voters' choice for judge of the General County Court were cast in said general election, which was duly held on 8 November, 1932. No other person's name appeared on any ballot in said general election as candidate of any other political party for

said judgeship. And no ballots were cast containing the name of any other person as a voter's choice for said judgeship.

(e) The board of canvassers for Alamance County certified that the plaintiff received the highest number of votes for judge of the General County Court of Alamance County and declared plaintiff elected to such office.

(f) That a specimen or copy of the ballot for county officers voted in the general election in Alamance County on 8 November, 1932, is hereto attached and marked Exhibit No. 1.

11. That the plaintiff was the only person who filed his name as a candidate for judge of the General County Court of Alamance County for the primary election in June, 1932, and the defendant had no knowledge prior to the time the ballots for said primary election were printed that plaintiff's name would appear thereon.

12. The plaintiff made application to Dennis G. Brummitt, Attorney-General of North Carolina, for leave to bring this action, and filed with said Attorney-General a bond in the form required by law and obtained such leave from said Attorney-General, all of which now appears on file in the office of the clerk of the Superior Court of Alamance County, North Carolina.

13. That the defendant before filing his answer in this cause executed and filed in the office of the clerk of the Superior Court of Alamance County an undertaking with good and sufficient surety in the sum of $200.00 condition as required by Consolidated Statutes, section 878.

It is further stipulated and agreed by and in behalf both of plaintiff and defendant that the resolution passed by the board of commissioners of Alamance County, 3 May, 1926, and attached to the answer as Exhibit "A" and hereby referred to and made a part of the agreed facts was sufficient to establish or organize and did establish or organize the General County Court of Alamance County under the provisions of chapter 216, Public Laws of 1923, and acts amendatory thereof, and said court has ever since been and is now in existence under and by virtue of said resolution of the board of commissioners and said chapter 216, Public Laws of 1923, and acts amendatory thereof, in force at the time of the passage of said resolution and as amended by acts of the General Assembly of North Carolina passed subsequent to the adoption of said resolution.

Upon the foregoing facts the trial court adjudged that the defendant is the duly elected, qualified, and presiding judge of the General County Court of Alamance County, that the purported election of the plaintiff is void, and that the action be dismissed. The plaintiff excepted and appealed.

Cooper A. Hall and J. A. Bailey for plaintiff.
H. J. Rhodes, J. Dolph Long and W. S. Coulter for defendant.

ADAMS, J. At the session of 1923, the General Assembly enacted the following statute: "In each county of this State there may be established a court of civil and criminal jurisdiction, which shall be a court of record and which shall be maintained pursuant to this act, and which court shall be called the General County Court and shall have jurisdiction over the entire county in which said court may be established." Public Laws, 1923, chap. 216, sec. 1. Section 20 provided that before establishing the court the board of county commissioners should submit the question of its creation to the qualified voters of the county; but in 1924 this section was amended by providing that the commissioners of any county, if in their opinion the public interests would thereby best be promoted, might establish a general county court by resolutions reciting the reasons therefor and that it should not be necessary that an election be called on the question; also that upon adoption of such resolutions the commissioners might establish the court without holding an election. Public Laws, 1924, Extra Session, sec. 2(24-a).

On 5 May, 1926, the board of commissioners of Alamance County established a General County Court by a resolution duly adopted, in which the reasons for taking such action were fully set forth in compliance with the statute. The plaintiff assails the resolution and the establishment of the county court on the ground that these functions were exercised by the board of commissioners in pursuance of delegated legislative powers; but in our opinion he cannot avail himself of this position.

True, it is a general rule, subject to exceptions, that the General Assembly cannot delegate to any other agency the authority committed to it by the sovereign power of the State. The principle has no application, however, to the establishment of county courts by a board of county commissioners clothed with power merely to find the facts with respect to the necessity or expediency of the court, for in such case the distribution of judicial power is made by the legislative department. *Provision Co. v. Daves,* 190 N. C., 7. In the present case the board of commissioners did not undertake or pretend to confer any degree of jurisdiction; its only duty was to find certain facts and to adopt a resolution containing specified recitals. Furthermore, the Legislature of 1927 passed a general law ratifying the acts of county commissioners in the organization of general county courts theretofore organized under the act of 1923 and its amendments, the appointment of the judge being an essential part of the organization. In addition to these facts there is another. The plaintiff stipulated and agreed that the resolution passed

by the board of commissioners of Alamance County on 3 May, 1926, and affixed to the answer as an exhibit, was sufficient to establish or organize the General County Court of Alamance County under the provisions of the act of 1923 and the acts amendatory thereof and that the court has since been and is now in existence under and by virtue of the resolution.

The fundamental question is whether the board of commissioners had the legal right to elect the judge of the county court. The answer depends primarily upon the construction of Article IV, sec. 30, of the Constitution, which is as follows: "In case the General Assembly shall establish other courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years."

Section 2 states the division of judicial powers in these words: "The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law," and section 14 directs that "the General Assembly shall provide for the establishment of special courts for the trial of misdemeanors in cities and towns, where the same may be necessary."

In this enumeration general county courts are not mentioned. They must be ranked among the "other courts" alluded to in the second and thirtieth sections, and provision for the manner of their election is expressly committed to the Legislature. Justices of the Supreme Court shall be elected by the qualified voters of the State, and judges of the Superior Court by the qualified voters of the State or of their respective districts. Solicitors and clerks of the Superior Court are elected by the qualified voters; the clerk of the Supreme Court is appointed; justices of the peace may be elected or appointed; but the judge of a general county court created under the act of 1923 and the acts amending it "shall be elected in such manner as the General Assembly may from time to time prescribe."

The distinction between the prescribed modes is significant. The word "election" does not necessarily import a popular choice by qualified electors; to elect is to choose or designate for an office by a majority or plurality vote. The Legislature may elect officers when not forbidden by the Constitution. (*Ewart v. Jones,* 116 N. C., 570), and when in the exercise of power conferred by the Constitution, the Legislature designates another body or agency to make such election, its action in this respect may not be regarded as the unlawful delegation of legislative power. *Vide S. v. Gales,* 77 N. C., 283; *White v. Murray,* 126 N. C., 153.

In 1924 the second section of the act of 1923 was amended by adding thereto the following clause: "If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such judge, fixing his term of office, in which event the judge so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided for." In the resolution adopted on 5 May, 1926, the commissioners declared that in their opinion the best interests of the county would be promoted by the appointment of the judge and not by his election by a vote of the people. They fixed his term of office at two years and provided that a judge should be appointed biennially, evidently intending that the facts as found should apply to the appointee and his successors.

It is of negligible importance whether the choice be called an appointment or an election; the two words are used indiscriminately in the proceedings of the board, and at the regular meeting on 2 May, 1932, the defendant was declared "elected." The selection of the defendant was made by ballot, the chairman not voting. Four ballots were cast, three for the defendant who was thus chosen for the office by a majority vote. Judgment

Affirmed.